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PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America or of any of its possessions or of any country in the Western Hemisphere, who are actively engaged wholly or partly in the practice of that branch of the law pertaining to the business of insurance in any of its phases or to Insurance Companies; to promote efficiency in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States of America or in any country in the Western Hemisphere; and to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page

The Chairman of your Entertainment Committee, Mr. L. J. (Pat) Carey, Mrs. Carey and I arranged to visit Lake Placid Club before attending the American Bar Association Convention in New York. The trip is an overnight journey on the train from New York to Lake Placid. The railroad station is in the immediate vicinity of the clubhouse so no transportation problems were encountered.

We found the Club in most respects to be very suitable for our 1952 convention. The scenery is superb. The rooms and cottages are comfortably, but rustically, furnished. Some of the cottages will accommodate four or five couples and we felt that many of you would enjoy being associated in these cottages with your immediate friends.

The Club can be justly proud of its new golf clubhouse which has been recently completed and is situated within walking distance of the main clubhouse. There are two eighteen-hole golf courses and one nine-hole course. The latter course, I know, will be enjoyed especially by the ladies. There is to be a ladies' golf tournament.

In addition to golf there are many other activities available for both the grown-ups and the children, such as, canoeing, swimming, skeet shooting, horseshoe pitching, shuffleboard and tennis.

I am sure that the members of our Association who are able to attend the 1952 Convention will thoroughly enjoy this place although they will not find it to be quite as luxurious as The Greenbrier.

The Mid-Winter meeting of the Executive Committee of the Association will be held on January 15, 16, 17 and 18, 1952, at which time this Committee will fix the site of the 1953 convention and act upon many other problems that are on the agenda.

JOSEPH A. SPRAY,
President.

Attention Members

Reservations—1952 Convention

Lake Placid Club—June 17, 18 and 19

Please do not attempt to make reservations for the convention until you hear from Mr. John A. Kluwin, our Secretary, who will write you in the next few weeks covering the details relative to making reservations for the 1952 convention. After you hear from the Secretary, I suggest that you then make your reservations at your earliest convenience.

COMMITTEE APPOINTMENTS AND REPORTS

Your Editor has been advised by the President that committees for the year 1951-1952 have been appointed, and the members notified of their appointment. A list of these committees and the chairmen and members of the committees will appear in the January issue of The Journal. If, for any reason, you cannot serve and do the work assigned to you, please notify your President immediately, in order that he may fill your place on the committee. Your Editor suggests that each committee chairman immediately contact the members of the committee and allocate to each member the work he is expected to do, to the end that your report be available for publication in the April 1952 issue of The Journal. For your report to be published in the April 1952 issue it should reach the Editor prior to March 1, 1952.

THE JOURNAL

In 1947 the West Publishing Company, as a courtesy to the Association, published an Index of articles appearing in The Journal from the year 1934 through 1946. If any member does not have this Index you may secure a copy by writing the Journal office. If any member does not have a complete set of journals if you will write the Journal office, we will be glad to help you complete your set. The extra Journals will be supplied to you at the regular price.

Please keep in mind that The Journal is only as good as the articles which appear therein. The Journal does not pay for articles, and relies solely on contributions made by members and their friends. The supply of articles for The Journal is alarmingly low, hence please take this as a personal appeal to you to furnish, or to secure, an article for the January 1952 or April 1952 issues.

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PUBLISHED QUARTERLY BY
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INSURANCE COUNSEL

GEORGE W. YANCEY, *Editor*
MASSEY BUILDING
BIRMINGHAM, ALABAMA

MILLER MANIER, *Associate Editor*
BAXTER BUILDING
NASHVILLE, TENNESSEE

The Journal welcomes contributions from members and friends, and publishes as many as space will permit. The articles published represent the opinions of the contributors only. Where Committee Reports have received official approval of the Executive Committee it will be so noted.

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Report of Automobile Insurance Law Committee

THE Automobile Insurance Law Committee appointed by President Wayne E. Stichter had its initial conference at Greenbrier in July 1950, when it was decided to undertake a rather ambitious program. The members present concluded that the efforts of the Committee should be concentrated on certain topics which might prove of benefit to the Association. Research was thereafter undertaken to assemble as much pertinent data as possible on selected specialized subjects and in regard to other important current citations and legislative enactments.

In order to facilitate the functioning of this Committee more efficiently, its supervisory labors were allocated to divers members.

H. Beale Rollins, vice-chairman, agreed to assume responsibility for intensive study and preparation of the necessary papers on the subjects: "Loading and Unloading," "Drive Other Car Coverage" and "The New Garage Policy." Excellent papers were thereupon prepared under the aegis of H. Beale Rollins, which are to be submitted and published as part of the report of this Committee.

The paper on "Loading and Unloading" was prepared by John H. Anderson, Jr. (Page 355 of this issue). It is hoped that the membership of the Association will derive much valuable information from this splendid article upon one of the most controversial subjects in the field of automobile insurance law.

The treatise on "Drive Other Car Coverage" was written by Fletcher B. Coleman. (Page 360 of this issue). This, too, is a comprehensive and erudite analysis of another phase of insurance law which has challenged the best legal and judicial minds in recent months. We anticipate that this article will be favorably accepted by the membership of the Association.

The topic "The New Garage Policy" was assumed by Frederick C. Wardle. (Page 367 of this issue). This is a rather highly specialized subject concerning which only a few may know a great deal and of which many lawyers possess very little knowledge. However, since it is essentially new and novel those who have an understanding of this coverage at its inception may, with greater facility, observe tendencies in the field of garage insurance and in the legal ramifications thereof. We sincerely anticipate that this excellent paper will meet with the approval of the membership of the Association.

In addition to these papers there is another in process upon the subject "Claims Valuations and Damages." When completed and approved by the Automobile Insurance Law Committee it will be thereafter submitted for publication in the Insurance Counsel Journal.

This topic, as one can readily appreciate, may prove as wide as the prairies but it is our purpose to avoid the trite and hackneyed in a field on which every insurance lawyer and insurance official is already well informed. However, the present trend, due to the inflationary spiral and the economic cycle, has caused a remarkable revision of thought upon questions of the value of claims and the appraisal of damage quotient.

It is, of course, well recognized that in the realm of casualty insurance the outgo of claims payments may be the trickle through the dam that contains the reservoir of company finances, or it may be the normal, usual anticipated flow which would be contained in calculated risks, or it may develop into a tremendous flood far exceeding even the most fantastic high water levels.

These papers have been prepared and are being submitted as indicated, in lieu of the forum time which, in previous years, had been devoted to the consideration of problems involving automobile insurance law. It was felt that at the Convention in 1951, the forum time should be granted to matters which are the subject of research by other Committees of this Association.

We were determined to keep abreast of the changing times by earmarking for notation certain cases more recently adjudicated and the trend of legislation. In highlighting these cases it has been our desire to have the base as broad as possible; and we trust that they may be informative and enlightening.

EXCESS LIABILITY – REFUSAL TO SETTLE–AND RESPONSIBILITY OF INSURER TO DEFEND.

(1) In *American Casualty Company of Reading, Pa. v. Elaine H. Howard,* et al.

(USCA, 4th Cir. 34 AC 666, affd. 35 AC 704, Feb. 1951) the evidence presented in the court below related to an automobile owned by Elaine H. Howard and operated by her husband, Elias Howard, with her permission. This car was insured in the American Casualty Company of Reading, Pennsylvania, to the extent of $5,000.00 for personal injuries or death of one person, and $5,000.00 for property damage. On May 1st, 1947, just outside the city limits of Greenville, South Carolina, Elias Howard, while making a U-turn on the highway, was involved in an accident with a motorcycle driven by one George Roberts, who died shortly after the collision, leaving him surviving his parents, three brothers and a sister. There were no laws or traffic regulations which forbade the U-turn. The accident occurred about noontime on a clear day. There was evidence to the effect that "Howard gave a hand signal before making the turn; that he was operating his car slowly and carefully which should have enabled Roberts to have observed Howard's car when the motorcycle was some distance from the car." There was further evidence "that the motorcycle was proceeding at a very high rate of speed and that it collided with the right side of the Howard automobile, indicating that the car had almost completed its turn." The coroner held the Howards for the Grand Jury for reckless driving but the Grand Jury returned "No Bill."

The American Casualty Company conducted a thorough investigation and retained as counsel "a thoroughly reliable, experienced and competent firm of attorneys."

Action was brought to recover damages for Roberts' death in the sum of $50,000.00. The insured were notified that there was excess exposure and retained their own attorneys who cooperated with the attorneys retained by the insurer in the defense of the suit. Conferences were held between the attorneys for both sides in an effort to settle. The insurer offered $2,500, then $3,000, later $3,500, and finally $4,000 to settle the case. Counsel for the administrator declared that he would take $5,000 and the personal attorneys for the insured demanded that the insurer settle for that amount. The very best offer, however, which the insurer made in settlement was $4,000.

The action was tried under the South Carolina Lord Campbell's Act and resulted in a verdict for the plaintiff in the sum of $7,000. No appeal was taken. The insurer paid $5,000 and costs and the remainder of the judgment, in the sum of $2,000, was paid by Elias Howard. Thereafter the administrator of Roberts brought another action against Howard under the South Carolina Survival Act for damages in the sum of $25,000 for conscious pain and suffering endured by Roberts before his death and for property damage.

On September 1, 1948 the American Casualty Company commenced an action for declaratory judgment seeking relief from any further liability or obligation under its policy contract on the ground that it had paid the sum of $5,000, the extent of its policy coverage, with costs. Howard thereupon sued the insurer to recover the excess payment of $2,000 and for $1,000 expenses, alleging that "the American had negligently failed to accept the offer (of $5,000) in total disregard of its obligation to the assured." Howard claimed that American, in a long-chance effort to protect itself, forced Howard to take a highly probable chance of losing many thousands of dollars.

The District Court stated that American had to defend the civil action brought by the administrator for conscious pain and suffering and that the insurer had to pay to Howard the sum of $2,000 which he had paid in the action for damages for Roberts' death.

The Circuit Court recognized that under the controlling law of South Carolina "the insurer owes to the insured the duty of settling a personal injury claim covered by the policy if the settlement is the reasonable thing to do, or, that the insurer is liable to insured if the insurer's failure to settle is due to either fraud or bad faith or negligence." (*Erie Railroad v. Colby and Tompkins,* 304 U. S. 64; *Tyger Pine Co. v. Maryland Casualty Co.,* 163 S. C. 229, 161 S. E. 491, 170 S. C. 286, 170 S. E. 346).

The questions presented on the appeal were (1) whether the insurer, having paid its $5,000, was still obligated to defend the action for conscious pain and suffering, and (2) whether the insurer was obligated to pay the insured the $2,000 for the excess liability.

The Circuit Court decided that the obligation to pay up to certain policy limits was separate and distinct from the obligation to defend any and all actions arising out of the one occurrence, and held that the American Casualty Company was re-

quired to defend the action for damages for conscious paint and suffering, citing *Lumbermens Mutual Casualty Co. v. McCarthy*, 8 Atl. 2d 750 (N. H.) 126 A. L. R. 894, declaring "the obligation to defend suits is entirely independent of the obligation to pay for bodily injuries and property damage."

However, the Circuit Court of Appeals reversed the District Court and declared that the insurer was not obligated to reimburse the insured for the $2,000 excess payment. There are many cogent and well delineated statements in the learned opinion of the Court, taking umbrage with the District Court's opinion that "only a foolish optimism would prompt the refusal of such an offer of settlement." The Circuit Court noted that the insurer made, (1) "a thorough investigation of the circumstances surrounding the accident;" (2) the insurer notified the insured of the policy limits and advised that the insured could, if he wished, retain his own counsel; (3) the insurer retained a law firm of "competent, reliable and experienced lawyers;" (4) repeated attempts were made by the insurer to settle with the counsel for the administrator; (5) the insurer "did a good job of it" in the defense of the action, and (6) the insurer "wisely decided" against an appeal from the judgment.

Of particular significance is the fact that in the trial in the District Court the insurer produced expert testimony of other lawyers of "unquestionable competence and experience" who expressed the opinion that they agreed and co-incided with the decision of the insurer's attorneys that no more than $4,000 should have been offered in settlement. These expert witnesses said that they should have taken "the same position in the settlement negotiations" as that taken by the insurer's attorneys. The Circuit Court then concluded its exhaustive opinion with these pertinent paragraphs:

> "No countervailing evidence of this type was introduced on behalf of Elias Howard, whose counsel seem to rely, as did the District Court, on the proposition that the facts and circumstances of the accident which resulted in the death of Roberts in themselves warrant the conclusion that American was negligent in not accepting the settlement offer of $5,000. With that we cannot agree. A fair gauge or standard by which the conduct of Messrs. Haynsworth & Haynsworth in the settlement negotiations here involved ,can be appraised, prospective as that conduct had to be in contemplation of the possibilities and probabilities of the outcome of the litigation, would seem to be the judgment of other reasonable and competent lawyers who by experience were familiar with local law and local jury verdicts in cases similar to the one in question.
>
> "In *Blue Bird Taxi Corporation v. American Fidelity & Casualty Co.*, 26 F. Supp. 808, 810, District Judge Myers in a case quite similar to that before us, decided in favor of the insurer, discussed the *Tyger River* case, supra, and stated:
>
> > 'A number of reputable attorneys, experienced in the handling of damage suit defenses under indemnity contracts, testified that in their opinion, the handling of the matter by the attorneys for the defendant Indemnity Company was reasonable, and with due regard of the interests of the plaintiff Taxi Corporation— both in the refusal of the compromise offer of settlement and in the handling of the appeal.'
>
> "Lawyers representing liability insurers of motor users are not required to be prophets who can accurately foretell the results of litigation in personal injury cases arising out of automobile accidents, nor does a mere mistake of judgment by these lawyers impose liability on these insurers beyond the policy limits of coverage. If these lawyers act reasonably, in good faith and without negligence in refusing proffered settlements, they, and the insurers they represent, have fully lived up to the duties imposed upon them. See *Bedford v. Armory Wholesale Grocery Co.*, 195 S. C. 150, 10 S. E. 2d 330; *Lynch v. Pee Dee Express*, 204 S. C. 537, 30 S. E. 2d 449; *Farmers Gin Co. v. St. Paul Mercury Indemnity Co.*, 186 Miss. 747, 191 So. 415; *Burnham v. Commercial Casualty Insurance Co.*, 10 Wash. 2d 624, 117 Pac. 2d 644.
>
> "We have adverted at some length to the duty of the insurer under the policy here to safeguard the interests of the insured. It should be remembered, though, that the premium on such policies varies with the insurer's maximum limit of liability under the policy. Accordingly, when the insurer fully lives up to its

duty, there is no right in the insured to compel the insurer to offer the amount of its maximum limit in order to effect the amicable settlement of a claim against the insured and to protect the insured against a possible judgment in excess of the policy limit. Insured can readily secure all needed protection by purchasing, and paying for, a policy with a high limit of liability on the insurer.

"The judgment of the District Court is reversed and the case is remanded to that court with instructions to enter a declaratory judgment. . . . "

(2) In the case of *Home Indemnity Company v. Williamson,* (1950) (U. S. C. C. A. 5th Cir.), 183 Fed. 2d. 572, the insured failed to inform the insurer that his automobile, which was driven by a schoolmate of insured's son without his or his son's knowledge or permission, was involved in an accident. Notice of suit was immediately given the insurer who undertook the defense on behalf of the assured under non-waiver agreements. The insured had no notice of the opportunity for settlement before trial for the sum of $4,500, which was within the policy limits. Judgments totaling $17,500 were obtained, which were affirmed on appeal. The insurer thereupon instituted an action for a declaratory judgment to avoid payment of the judgment upon the ground that the insured had failed to give proper notice. The trial court held that although due notice had not been given, the insurer had waived this as a matter of law, and that the insurer was liable to the limits of the policy but not for the excess payment. The Circuit Court affirmed with respect to the liability of the insurer for payment up to the policy limits and reversed to allow a jury trial with respect to the issue of the insurer's bad faith on the exposure in excess of the policy coverage.

(3) An action was instituted by one *Desmond against Wilson,* who was insured in the Aetna Casualty Company and had a policy to the extent of $10,000 for one injury. Desmond obtained a judgment for $12,160.22. The insurer paid its $10,000; the insured paid the excess and brought action to recover from the insurer the amount so expended. The issue which was determined in the Maine Supreme Judicial Court revolved around the question of whether the insurer was negligent in failing to settle the Desmond case for $8,500. The Appellate Court there stated:

"It seems unnecessary to review or to analyze the authorities they have cited to us, or any of them, although we declare recognition of the principle of law, on which there seems to be no dispute, that an insurer is liable to his insured for bad faith or for negligence in the preparation or conduct of the defense of any action he has contracted to defend. It is well established also that he may be subject to liability, under appropriate circumstances, for a failure to accept an offer of compromise."

The Court added, however, that

"For the purpose of considering these allegations we assume, although declaring expressly that our assumption should not be considered as the expression or intimation of an opinion on the issue, that this Court will adopt the 'rule of negligence' as distinguished from the 'bad faith rule' . . . in 'compromise' cases."

The Court further said:

"The issue is neither more nor less than whether a contractual liability may be increased by negligent action. We have stated our recognition of the principle that it may, as a result of negligence in the preparation or conduct of a defense. We have said also that for the purposes of this case we shall assume, without deciding, or either expressing or intimating any opinion with reference thereto, that the rule of negligence, as it is styled by Appleman, should be recognized in compromise cases. Within that principle, as we would construe it, if we adopted it, we do not consider that the facts entitle the insured to recover from the insurer."

Wilson v. Aetna Casualty and Surety Co., (1950) Maine 76 Atl. 2d. 111.

(4) Declaring that "the bad faith theory is the proper one" in an excess liability case, the United States District Court, District of California, cited numerous cases illustrative of the California law, and dismissed a complaint alleging the insurer's negligence in failure to settle within the policy limits.

Christian v. The Preferred Accident Insurance Company, et al. (1950) (U. S. Dist. Ct., N. D. California) 89 F. Supp. 888.

CONTRIBUTORY NEGLIGENCE—PEDESTRIAN CROSSING WITH GREEN LIGHT.

Does a green light give a "green light" to a pedestrian crossing the highway? Apparently not in the State of Michigan. Recent decisions there will render it almost impossible for a pedestrian to recover under such circumstances, unless, of course, he is scrupulously careful and does not rely solely on the fact that the light is green in his favor. In a case decided in January, 1951, the court held that a pedestrian crossing with a green light is not necessarily protected; he must still make observation of traffic conditions and of the approach of vehicles, even those which may be driven against the influence of a red light.

Morse v. Bishop (1951) 329 Mich. 488, 45 N. W. 2d, 367.
Boyd v. Maruski (1948) 321 Mich. 71, 32 N. W. 2d. 53.

DAMAGES FOR PRE-NATAL INJURIES.

The Court of Appeals of Maryland, in *Damasiewicz v. Gorsuch,* 79 Atl. 2d 550 (Court of Appeals Maryland, March 1951) indulged in a thorough analysis of the common law and emphasized the present conflict of laws in divers American jurisdictions in its consideration of an appeal, upon a demurrer, raised with respect to the issue of damages for pre-natal injuries.

The infant plaintiff, Thomas Joseph Damasiewicz, brought action through his father and next friend, alleging in his declaration that while he was *en ventre sa mere,* his mother was riding in an automobile operated by one of the defendants, which automobile was struck by another car operated by the co-defendant. As a result of this accident the infant was prematurely born and thereafter suffered permanent injuries causing him to lose the sight of both eyes. He claimed damages against the owners and operators of both vehicles, both of whom filed demurrers. A divided court overruled the demurrers and held that the infant was entitled to recover damages for the injuries sustained prior to his birth. The Appellate Court of Maryland discussed the issue from the time of Sir Edward Coke in 1738 to date. Among other illuminating excerpts from this opinion are the following:

"In Blackstone's Commentaries (1765), Book 1, Chapter 1, pp. 129, 130, is found the following:

'Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor.

'An infant *en ventre sa mere,* or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours.'

* * *

"There does not seem to have been any case, either in England or in America which passed upon the right of an unborn child to recover damages for a tort until the case of *Dietrich v. Inhabitants of Northampton,* 138 Mass. 14, decided in 1884. The opinion in that case was written by Justice Oliver Wendell Holmes, then sitting on the Supreme Judicial Court of Massachusetts. The case was a suit by the administrator of a child, which was born prematurely as a result of the fall of its mother on a highway of the town of Northampton. The child was not directly injured, but the shock to its mother caused the premature birth and it was unable to survive, although it lived for ten or fifteen minutes after birth. Suit was brought under a statute imposing liability on the township. Justice Holmes cited the rule of criminal liability laid down by Lord Coke, although he expressed some doubt that this represented the common law, and then said: 'For, even if Lord Coke's statement were the law of this Commonwealth, the question would remain whether the analogy could be relied on

for determining the rule of civil liability. Some ancient books seem to have allowed the mother an appeal for the loss of her child by a trespass upon her person. Abbrev. Plac. 26, col. 2 (2 Joh.) Lincoln rot. 3. Fleta, I. c. 35 Sec. 3, and Sir Samuel Clarke's note, citing 45 H. III, rot. 22. Which again others denied. I Britton, (Nichol's ed.) 114. See Abbrev. Plac. 295, col. 2 (29 Ed. I.) Norht. rot. 43. Kelham's Britton, 152, n. 14.' Then, after some further discussion, he concluded: 'Taking all the foregoing considerations into account, and further, that, as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning. . . . ' It will be noted that, while Justice Holmes cites no cases, his decision is based upon the same theory stated by Lord Coke in the Earl of Bedford's case, namely, that until birth, the child is a part of the mother."

Citing the dissenting opinion of Mr. Justice Boggs in *Allaire v. St. Luke's Hospital*, 184 III. 359, 56 N. E. 638, 484 L. R. A. 225, the Court continued:

> " 'The law should, it seems to me, be that whenever a child in utero is so far advanced in prenatal age as that, should parturition by natural or artificial means occur at such age, such child could and would live separable from the mother, and grow into the ordinary activities of life, and is afterwards born, and becomes a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother.' "

The court observed that there are two divergent questions with respect to the capacity to sue in a case of this kind. Certain jurisdictions such as Massachusetts, Illinois, Rhode Island, New York, Missouri, Alabama, Texas, Michigan, Pennsylvania and New Jersey, hold that an unborn child is part of the mother. Restatement of the Law of Torts follows this contention. Those holding *contra* are Ohio, Minnesota, District of Columbia and an intimation that New Hampshire, Louisiana and California might also be similarly inclined.

However, the Maryland court decided that the mother would have no right of action for the loss of the sight of the child and that the common law rule of Maryland permitted the child, when born, to bring an action for damages for injuries prior to its arrival. In a concurring opinion, the premise is emphasized that the rule should not be applicable unless it is shown that the embryo has acquired "a human personality and become viable."

The concurring Judge made these perceptive observations in his refusal to permit the application of this phase of the law to become intertwined with any question of obstetrics and by declining to pass upon the question of the contributory negligence, if any, of the mother:

> " . . . Obstetrics is probably the oldest branch of medicine, practiced continually since the first operation upon Adam's rib, and the fact that an infant may be delivered and survive, before the full period of pregnancy, was known to antiquity and is attested by the birth of the historical Julius Caesar and the legendary Macduff. Nor are we at liberty to substitute modern medical views for those of the common law, in cases where the common law rule is well established. The problem is to determine the common law rule.
>
> "The rule that a child is in existence from the moment of conception, applicable in testamentary situations, has no application here. It seems to stem from the ecclesiastical law. . . .
>
> * * *
>
> " . . . The doctrine of contributory negligence is an integral part of the concept of negligence. To what extent the child's right of action may be barred by negligence of the mother is another question that is left open because it was not argued in this appeal."

There is, however, a dissent "in accordance with the decisions of the highest courts of Massachusetts, New York, New Jersey, Pennsylvania, Rhode Island, Illinois, Michigan, Wisconsin and Alabama."

In the April 1950 issue of the Insurance Counsel Journal a noteworthy article was written by J. Howard Gongwer on the "Right of Action for Pre-natal Injuries," in which a number of cases were cited, some of which were also reviewed by the Maryland Court of Appeals.

Legal Responsibility

One of the few cases interpreting the phrase in automobile policies with respect to those "legally responsible for the use thereof," is *Hawkeye Casualty Company v. Rose,* 34 AC 34 (5th Cir.). The husband of the named insured owner arranged for a friend to drive the designated automobile from New York City, where it had been recovered after a theft, to the owner's home in Missouri. En route, the friend was injured in an accident and brought an action in negligence against insured's husband for failure to reveal certain latent defects in the car. The Circuit Court, analyzing the underwriting intent, held that the husband was a person "legally responsible for the use thereof" within the scope of the omnibus clause of the policy.

Livery Exclusion

Livery exclusion was held not applicable where the insured's truck was used with named insured's permission to take members of a club on a picnic, a total of $16.00 being collected for the ride. It was determined that there was no "holding out to the public" and there was no pattern for such transaction. Judgment for the insurer in a declaratory action was accordingly reversed.

Stanley v. American Motorists Insurance Co., 73 Atl. 2d. 1 33 AC. 1062 (Maryland).

Employee Exclusion

(1) The driver of insured's truck was killed when the truck rolled upon him. An action in negligence was instituted by his administrator alleging faulty brakes. The employee exclusion was held to apply even though the deceased may have been a special employee of the contractor for whom the trucking was being performed. The court held that since the driver was at the same time a general employee of the assured, the two relationships were not inconsistent.

Central Surety v. Hampton, 33 AC 193 (5th Cir.)

(2) The employee exclusion was held applicable in a Supreme Court decision of the State of New York (Onondaga County) where injured was an employee of the named insured but not of the omnibus insured who were engaged in unloading a power train from the described truck and trailer. The court declared that nothing in the New York State Insurance Law, Section 167, nor in the policy itself, justified giving the additional insured any greater protection than the named insured had. This case does not follow the "severability of interest" doctrine.

Standard Surety & Casualty Company v. Maryland Casualty Company, 100 N. Y. Supp. 2d 79.

(3) The plaintiff Noe was an employee of a taxi business. She was injured while riding in her employer's taxi and obtained a verdict against the employer for personal injuries in the sum of $2,660.50. The action was not defended by the insurer and the judgment was not paid by the insured.

Noe then instituted an action to compel the insurer to pay the judgment. However, the insured sought to avoid payment on the basis of the exclusion clause in the liability policy relative to injuries to employees in the course of their employment. Judgment against the insurer was affirmed upon the ground that the policy covered the plaintiff's case because the plaintiff was a mere passenger in the taxi at the time of the accident even though she was en route to her home without paying any fare, in accordance with an agreement between the employee and the employer.

The Preferred Accident Insurance Company of New York v. Noe, (1950 Kentucky) 234 S. W. 2d. 748.

(4) A widow was barred from recovery for damages for her husband's death under the employee exclusion clause, where her deceased husband was a general employee of the insured truck-owner even though he might also have been a special employee of the contractor in and about the actual use of the truck on the job.

Central Surety and Insurance Corporation v. Hampton, etc., (1950, U. S. C. C. A. 5th Cir.) 179 Fed. 2d. 261.

Damages

Where an injury occurs outside the State in which the action is brought the amount of recovery is governed by the *lex loci* and not by the *lex fori.*

Stoltz v. Burlington Transportation Company (1949—U. S. C. C. A. 10th Cir.) 178 Fed. 2d. 514.

OPERATOR'S INSURER AGAINST AUTOMOBILE INSURER.

Charles W. Phillips, who had operator's insurance in the Citizens Casualty Com-

pany, was driving, with her permission, an automobile owned by his wife, who had automobile insurance in the Celina Mutual Casualty Company of Ohio, when an accident occurred as a result of which an infant was killed. It was held that since both the operator's policy and the automobile policy contained *pro rata* clauses and their contracts did not contain any other provisions limiting their liability, each was concurrently liable to the injured through the negligent operation of the insured vehicle by a permissive user who was covered by an operator's policy, and the loss was accordingly pro-rated between the insurance companies.

Celina Mutual Casualty Company of Ohio v. Citizens Casualty Company of New York, (1950—Maryland) 71 Atl. 2d. 20.

AUTOMOBILE INSURER AGAINST GENERAL LIABILITY INSURER.

While in the throes of a strike, Dan River Mills in Virginia, which employed 8,000 people, offered to pay its employees for the use of the employees' automobiles in transporting workers to and from the plant 6c a mile, and, in addition, to pay for the time consumed. An accident occurred involving the automobile of one Perkins, who was one of the employees. Perkins' automobile had coverage in the Maryland Casualty Company. The Aetna Casualty & Surety Company had a policy indemnifying Dan River Mills. When the accident to the Perkins car occurred the Maryland assumed the defense of the action, advising the insured that the Maryland covered the risk, and then, after paying the judgment, Maryland, as the automobile insurer, sued Aetna as the general insurer. Virginia's Supreme Court of Appeals held that inasmuch as the Maryland was primarily liable to the assured, it assumed liability for the risk and was, therefore, estopped from asserting a claim against the general liability insurer.

Maryland Casualty Co. v. Aetna Casualty & Surety Co., (1950) 191 Va. 225, 60 S. E. 2d. 876.

Permission

There have been a great number of contemporary decisions construing the omnibus clause of the auto policy, especially the word "permission." The courts have enunciated three different rules in the construction of this clause—the so-called "liberal rule," the "strict rule," and the "minor deviations rule." An illustration of the application of the "liberal rule" is the case of *Sun Underwriters v. Standard Accident,* 34 A. C. 581 (Louisiana). There, the insured's personal chauffeur, in the course of his employment, was directed only to move the automobile from the driveway into the garage. Instead he drove the car away on his own personal mission. The court held that, under the circumstances, it was sufficient to establish that the chauffeur was an insured, since he had initial permission to drive the vehicle. Such construction apparenlty based no heed to the word "actual" in the omnibus clause.

The 1950-1951 decisions seem to show a definite trend toward the so-called "minor deviations" rule, that is, the moderate and in-between rule which avoids the extremes of both the "initial permission" rule and the "strict" rule. A number of these cases cite the very excellent annotation on this subject in 5 ALR (2) 600. Such cases include *State Farm Mutual Insurance Company v. Birmingham Electric* (Ala. 34 AC 996), holding that there was omnibus coverage for the employee who made a thirty-minute deviation on personal business and was returning to his employer's place of business at the time of the accident; *Olgin v. Employers Mutual Casualty Company* (Texas, 34 AC 51), where the court held no coverage, the employee having made a three-hour stop at a pool hall in violation of instructions against personal use; *Morgan v. American Casualty Company* (Tenn., 34 AC 757), holding no coverage where the employee disconnected the speedometer and went off on a Sunday personal trip in violation against personal use—the court distinguishing earlier cases on the basis of the word "actual" in the policy; *Maryland Casualty Company v. Williams* (USCA, 5th Cir., 35 AC 68), where the law of Georgia is said to follow the "minor deviation" theory; and *New York Casualty Company v. Lewellen* (USCA, 8th Cir., 34 AC 1151), which finds that the law of Missouri has adopted the "minor deviation" rule.

The North Carolina Supreme Court in *Hooper v. Maryland Casualty Company,* 233 N. C. 154 (filed February 2, 1951), held that coverage of the policy was not extended to an employee while driving a truck on a personal pleasure mission at night or in the early morning, despite the fact that the employee had been allowed to keep the truck at his home overnight

to facilitate his departure for work in the morning.

Medical Payments Coverage

This is a comparatively new field. There have been few decisions construing the medical payments agreement. One of interest is the case of *The New Amsterdam Casualty Company v. Fromer,* 34 AC 1002 (District of Columbia), where the insured alighted from his automobile believing that he had been struck by another car. He walked back and learned that there had not been any accident. While returning to his own car and approximately six feet away from it he was struck by a passing motorist and thrown against the rear bumper of his own car. The court held that there was no medical payment coverage inasmuch as intent to enter does not convert an act of "approaching" into an act of "entering."

WIFE'S RIGHT OF ACTION FOR LOSS OF CONSORTIUM

(1) A wife has been held to have a cause of action for loss of consortium due to the negligent injury of her husband in *Hitaffer v. Argonne Co., Inc.* (United States Circuit Court of Appeals, District of Columbia) 183 Fed. 2d 811, certiorari denied October 16, 1950 71 U. S. S. C. 80.

(2) One of the most comprehensive, if not momentous, decisions on this subject was rendered by Hon. Charles S. Colden, Justice of the Supreme Court of the State of New York, Tenth Judicial District, on May 10, 1951, as reported in the New York Law Journal (official citation not presently available), in *Passalacqua v. Draper, Jr.,* et al.:

"Plaintiff Anthony J. Passalacqua sues the defendant to recover damages for personal injuries claimed to have been sustained by him while a passenger on a Long Island Railroad train which was in a collision with another train of that railroad at or near Richmond Hill, New York, on November 22, 1950. His wife, the plaintiff Florence Passalacqua, seeks damages of said defendant alleging in her cause of action that she 'has suffered the loss of the services of her said husband which had, prior to his injuries as hereinbefore set forth, been of great value to her and she has been deprived of her husband's affection, society, companionship and consortium. The plaintiff, Florence Passalacqua, has rendered services and will be required to render services in the future for the care of her said husband. That she has been and will continue to be otherwise greatly injured, inconvenienced and harassed because of the recklessness, carelessness and negligence of the defendants, as aforesaid.' It is the latter cause of action which the defendant, William H. Draper, Jr., as Trustee of the Long Island Railroad, now challenges for legal insufficiency, contending that no right of action exists in this state in favor of a wife for her loss of consortium due to the personal injuries suffered by her husband.

"Three decisions in the courts of this state have been referred to by the moving defendant as standing for the proposition that no cause of action, such as has been pleaded by the plaintiff-wife, is maintainable here. The first, *Goldman v. Cohen* (30 Misc., 336, 63 N. Y. S. 459) was decided in January, 1900, by Mr. Justice Russell sitting in the Special Term of the New York County Supreme Court. There the defendant demurred to a similar complaint. The court sustained the demurrer on the ground that neither the common nor the statute law afforded any ground for such an action. In distinguishing between the invasion of a wife's rights through willful and malicious misconduct and fault through negligence, the court pointed out that redress for invasion by willful misconduct was then recognized and heavy damages were inflicted upon the enticer or seducer as 'punishment and atonement rather than compensation.' The fault of negligence, however, rarely demanded a greater remedy than mere compensation. 'The right of action is remedial — not punitive. It reaches not out to those indirectly suffering by impairment of domestic relations and give to dependent wife or child pecuniary equivalent. So far as the law can it neutralizes such indirect losses by compensation to the husband and father thus giving him the means of supplying the loss in earning power and expenses of sickness and so avoids double or triple recoveries for the same elements of compensatory damages by different persons against him whose fault only gives ground for one restitution' (p. 337).

"The second, *Landwehr v. Barbas* (241 App. Div. 769, 270 N. Y. S. 534,

aff'd. without opinion, 270 N. Y. 537) was decided by the Second Department in March, 1934. There the court held that the loss of opportunity of the child-bearing due to physical injuries of a husband caused by the negligence of a third party has never been recognized as giving a cause of action to a husband or wife against the wrongdoer.

"The third, *Maloy v. Foster* (169 Misc. 964, 8 N. Y. S. 2d. 608), was a decision by Mr. Justice McNaught rendered in the Supreme Court, Tioga County, on December 27, 1938. In dismissing the complaint, pursuant to Rule 106 (5) of the Rules of Civil Practice, the court concluded, after a review of the authorities, that anomalous though it may seem, a husband may maintain an action for loss of consortium when his wife is injured by a third party, but the latter is denied an equal right.

"The latest reported decision on the subject was made by the United States Court of Appeals, District of Columbia Circuit, on May 29, 1950 (*Hitaffer v. Argonne Co., Inc.* 183 F. 2d, 811, certiorari denied on October 16, 1950, 340 U. S. 852). There the court held that a wife has a cause of action for loss of consortium due to a negligent injury of her husband and that the husband and wife have in the marriage relation *equal rights* which should receive *equal protection* of the law. The court observed, at p. 819: ' . . . it appears to us that logic, reason and right are in favor of the position we are now taking. The medieval concepts of the marriage relation to which other jurisdictions have reverted in order to reach the results which have been handed to us as evidence of the law have long since ceased to have any meaning. It can hardly be said that a wife has less of an interest in the marriage relation than does the husband or in these modern times that a husband renders services of such a different character to the family and household that they must be measured by a standard of such uncertainty that the law cannot estimate any loss thereof. The husband owes the same degree of love, affection, felicity, etc., to the wife as she to him. He also owes the material service of support, but above and beyond that he renders other services as his mate's helper in her duties, as advisor and counselor, etc. Under such circumstances it would be a judicial *fiat* for us to say that a wife may not have an action for loss of *consortium* due to negligence.'

"With the views expressed by the learned judge who wrote the opinion for the Circuit Court in the Hitaffer case (supra), this court finds itself in accord. The status of a wife has changed materially in modern times. Women are not second rate citizens. They are active in the home, business, the professions, politics and in every phase of civic and community affairs. The area of their endeavor and the extent of their work is unlimited. When so-called intentional or malicious invasions of the right to consortium gave rise to a cause of action for damages in New York, no distinction was made between the wife's interest in the marital relation and that of the husband. The Court of Appeals expressed itself in this fashion in *Bennett v. Bennett* (116 N. Y. 584, 590): 'The actual injury to the wife from the loss of *consortium,* which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives to each the same rights in that regard. Each is entitled to the comfort, companionship and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character and attach to the husband as husband and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation not only of a natural right, but also of a legal right arising out of the marriage relation. . . . As the wrongs of the wife are the same in principle and are caused by acts of the same nature as those of the husband, the remedy should be the same.'

"The court can perceive no logic to the contention that a husband may sue for loss of consortium, but a wife may not where the injury caused by the third party is merely the result of negligence. Accordingly, for the reasons stated in the Hitaffer case (supra), the motion to dismiss the complaint is denied. In reaching this conclusion, the court has not overlooked the New York cases above referred to. The two Special Term cases are based upon no authoritative New York decision which this court is bound to follow. The Landwehr case (supra), decided by the Appellate Division, this

department, and affirmed without opinion by the Court of Appeals, is distinguishable on its facts in that there, the court merely decided that there can be no recovery by a wife for the loss of opportunity of child-bearing due to physical injuries of a husband caused by the negligence of a third party. In reaching that conclusion, the court was careful to point out that there were so many elements of doubt and conjecture in connection with the birth of children that it cannot be said that the wrong is the proximate cause of the loss."

Notice And Cooperation

(1) A significant recent decision in the Circuit Court of Appeals is *Ohio Farmers Indemnity Company v. Charleston Laundry Company,* 34 AC 632 (4th Cir.), wherein the named insured's employees gave false information as to who was driving the automobile. This was not held to be a violation of the notice clause inasmuch as there was still substantial compliance sufficient to advise the insurer of the accident. Furthermore, it was not considered to be a violation of the cooperation clause inasmuch as this clause requires "cooperation only after notice." The Court found, further, that such action was not prejudicial to the insurer as the harm, if any, had originally been committed when the employees gave the false information to the police.

(2) In *Smith v. Indemnity Company of North America* (1951 Maryland) 78 Atl. 2d. 461, the plaintiff Smith was a passenger on a trackless trolley of the Baltimore Transit Company, which trolley was in collision with an automobile owned by Catherine Pullman and operated by James E. Pryor. The Pullman automobile was insured in the Indemnity Company of North America. One week before the trial the insurer was unable to locate the insured at the given address. The trial judge granted a month's adjournment. Registered letters were returned undelivered. Summonses were returned *non est.* Investigation revealed that the insured had departed from the State. Judgment was subsequently entered against the insured and an attachment action was instituted against the insurer to recover on the judgment. The insurer interposed a defense of lack of cooperation on the part of the insured. The lower court, however, decided that there was nothing to show that the insured had notice of the imminence of the trial. The Appellate Court reversed without directing a new trial upon the ground that the insured had committed a wilful violation of the cooperation clause in leaving the State without notification or forwarding address. Since the insured had knowledge that suit had been instituted, such departure constituted bad faith. The court further found that the insurer had made all "reasonable diligent efforts" to procure the trial attendance of the insured, to no avail.

(3) An action for declaratory judgment was instituted by an insurer upon the alleged breach of the cooperation clause of the policy inasmuch as the insured had stated to the insurer's agent that the assured had been attending a party prior to the accident when, in fact, the assured had been at a road house. The Court decided against the insurer, stating that the insured did not breach the cooperation clause of the policy since the statement that the assured was at a party and not at a road house did not relate to any material issue and in nowise prejudiced the interests of the insurer. There is some suggestion in this decision that the insurer informed the insured that they were primarily interested in the facts at the time of the accident rather than what insured was doing before the occurrence.

Norwich Union Indemnity Co. v. Haas, (1950–U. S. C. C. A. 7th Cir.), 179 Fed. 2d. 827.

(4) In *West v. Monroe Bakery, Inc.,* et al. (1950), 217 La. 189, 46 So. 2d. 122, an action was instituted against the insurer by the injured party. Insurer interposed a defense to the effect that the insured had committed a breach of the notice provision in the contract. The Louisiana statutes confer a substantive right on third parties to contracts of public liability insurance which become vested at the time of the accident, subject only to such defenses as the tort feasor himself may legally interpose. It was held that this vested right is not contingent upon or subordinate to any stipulations between insurer and insured contained in the policy contract. Accordingly, the insured's breach of notice provision of the policy did not relieve the insurer of liability to the injured parties.

(5) The insurer was not relieved of liability because of insured's alleged breach of cooperation where insurer made only one attempt to notify the insured of the date of trial and where counsel for the insurer did not move for a continuance or

attempt to withdraw from the case when the assured failed to appear on the trial.

Hannig v. Hartford Accident & Indemnity Co., (1951—Illinois) 97 N. E. 2d. 476.

Heimlich v. Kees Appliance Company, (1950), 256 Wis. 356. 41 N. W. 2d. 359.

Frank v. Employers' Liability Assurance Corporation, Ltd., 166 Pa. Super. 476, 71 Atl. 2d. 835.

Reference to Workmen's Compensation

In *York Transport Company v. Moreland,* (1949—Texas) 224 S. W. 2d. 899, The Texas Court of Appeals correctly excluded all reference to the intervention in the action of plaintiffs' Workmen's Compensation insurer, since it was prejudicial to both the tortfeasor and the insurer for a court to permit to be brought directly to a jury's attention that defendant was protected by insurance.

Sole and Unconditional Ownership

The insurer was granted an injunction enjoining the defendants from prosecuting any actions against the insurance company under the provisions of the insurance contract on the ground that the insured was not the "sole and unconditional owner" of the vehicle named in the policy inasmuch as the vehicle was encumbered by a conditional sales agreement, of which the insurer was not informed.

Aetna Casualty and Surety Company v. Steffes, (U. S. D. C.—Northern Dist. of Illinois—Eastern Division, 1949), 33 Automobile Cases 229.

ATTORNEY'S FEES OF INSURED'S ATTORNEY IN ACTION FOR DECLARATORY JUDGMENT.

In an action for declaratory judgment instituted by the insured, the United States District Court, Southern District of California, declared that the fees of the assured's attorneys were properly allowable but the fee of the attorney for the injured passenger should not be allowed, stating that the fees of insured's attorneys constitute reasonable expenses "incurred at the company's request" by the insured in view of insurer's act in filing suit for declaratory judgment and inasmuch as the prayer of the insurer's complaint not only requested but required the insured to appear and establish his claim. Attorneys' fees totaling $1,500 were allowed to the insured's attorneys.

Standard Accident Insurance Company of Detroit v. Hull, et al. (1950—U. S. Dist. Ct. S. D. California, C. D.) 91 F. Supp. 65.

Automatic Insurance

The insured originally owned a coupe for which the policy afforded "business and pleasure" coverage rather than "commercial" coverage. Insured thereafter purchased a two-ton truck and had an accident with it within the thirty-day automatic insurance period. The court declared that there was no coverage, pointing out that the automatic insurance was restricted to "such insurance as is afforded by this policy applies" and that the insurance afforded by the policy was for "business and pleasure" and not "commercial."

Koehn v. Union Fire Insurance Company, (Nebraska) 40 N. W. 2d. 874, 33 AC 277.

Inasmuch as an insurance broker was considered to be the agent of the insured rather than the insurer, notice to the broker of the purchase of a new vehicle did not constitute notice to the insurer particularly since the broker failed to notify the insurance company within the thirty-day period after the purchase.

The Metropolitan Casualty Insurance Company of New York v. Buscher, (1950—U. S. Dist. Ct. N. D. Illinois, E. D.), 95 F. Supp. 500.

Collard v. Globe Indemnity Company, (1951—Louisiana), 50 So. 2d. 838.

Parking

(1) The highest appellate tribunal in the State of New York, the Court of Appeals, in *Axelrod v. Krupinski,* in an opinion on April 12, 1951, (official citation not yet available), rendered this important decision:

Defendant had engine trouble with his car on an express highway. He left his wife, who was 24 years of age, his mother-in-law, who was 50 years of age, and his baby in the automobile for a period of 20 to 25 minutes while he went to telephone for assistance. While so parked the plaintiff ran into the rear of the parked car. When plaintiff asked defendant why he was there, the defendant replied "Just parked." The New York Court of Appeals held that if defendant was "just parked" he was foolhardy; if he was in difficulty he should have made some effort to guard against such a foreseeable accident as occurred, stating that he could have requested his wife or mother-in-law, respectively, to remain at the side of the road far enough behind his automobile to give adequate warning to approaching motorists.

It might be well to note that if one, such as this defendant, literally followed the advice of the New York Court of Appeals, he might have mother-in-law trouble as well as engine trouble.

(2) In *Hancock v. Union Pacific Ry. Co.* (1950 Missouri) 231 S. W. 2d. 225, plaintiff sued to recover for the value of his truck and cargo which was struck by a train of the Union Pacific Railway Company while the truck was parked on defendant's platform in such a manner that the front end of the truck was about one foot from the track. The Appellate Court decided that it was a matter for the jury to determine whether such parking was negligent, noting that there was ample evidence that this mode of parking had been in existence for some time and defendant's agent was familiar with such practices and allowed such parking; furthermore, that the failure of defendant's agent to notify plaintiff's agent of the imminent approach of the train could have been inferred as a negligent omission.

Double Parking

A case which received a great deal of publicity in the City of New York was that of *David Sive v. Louis Newman,* who was insured in the Fidelity & Casualty Company. Newman's car was double parked in front of premises 419 West 119th Street, N. Y. C. Sive found that he could not extricate his automobile, which was properly parked at the curb, without colliding with the Newman car, as a result of which Sive's auto was damaged while he was trying to maneuver around the Newman car. Sive was awarded a verdict in the Municipal Court of the City of New York which was affirmed by the Appellate Term of the Supreme Court, First Department, as reported in the New York Law Journal of May 4, 1951, (official citation not yet available). The defendant contended that the proximate cause of the accident was Sive's operation of his automobile. The decision and affirmance was hailed by the New York press as a "blow against illegal double parking."

Recent Trends In Legislation

The following legislative enactments become effective in the State of New York on or about July 1, 1951. They are mentioned here only to illustrate the current legislative tendencies.

(1) Discharge of pupils amended to include the following:

"The driver of such school bus, when discharging pupils who must cross the highway or street, shall instruct such pupils to cross in front of the bus and the driver thereof shall keep the vehicle stationary with red signal lights flashing until such pupils have reached the opposite side of the highway or street."

(2) Personal liability limitations of New York taxicabs have been increased from $2,000-$5,000 to $5,000-$10,000 for vehicles of not more than seven passenger capacity.

(3) Requirements of financial responsibility have been increased from $5,000-$10,000 to $10,000-$20,000.

(4) For the first time the State of New York has a Compulsory Insurance Law. It applies to junior operators "because of a startling increase in the number of accidents involving youthful drivers, some safeguard must be taken to mitigate the hazard created by their reckless disregard for public safety and rules of traffic."

The cases and the legislation to which we have alluded may not be epochal. There are many other citations and laws of far-reaching import. But whether these references are landmarks or guide-posts, they are all integral parts of the passing scene. Perhaps they are reeds in the breeze or flotsam on the tide. In any event they should not be overlooked nor ignored in the evolution of insurance as it correlates with the profession of law.

"The Moving Finger writes; and having writ,
Moves on: nor all your Piety nor Wit
Shall lure it back to cancel half a line."

Respectfully submitted

JAMES DEMPSEY, *Chairman*
G. CAMERON BUCHANAN, *Vice-Chairman*
H. BEALE ROLLINS, *Vice-Chairman*
JOHN H. ANDERSON, JR.
FLETCHER B. COLEMAN
DONALD GALLAGHER
JOHN C. GRAHAM
J. L. LANCASTER, JR.
L. J. LOCKE
ROBERT M. MOORE
A. FRANK O'KELLEY
PAUL C. SPRINKLE
FREDERICK C. WARDLE
VICTOR DAVIS WERNER
ROBERT F. YOUNG
ROYCE G. ROWE, *Ex-Officio*

Scope of "Loading and Unloading" Clause of Automobile Insurance Policy

JOHN H. ANDERSON, JR.
Raleigh, N. C.

Prepared on Behalf of the Automobile Insurance Committee

THE automobile liability insurance policy now in general use protects the insured against legal liability caused by accident and "arising out of the ownership, maintenance or use of the automobile, and including the loading and unloading thereof." It is the purpose of this note to discuss the meaning of the "loading and unloading" clause and the extension of coverage afforded thereby in the light of available court decisions.

The courts which have considered the question agree that in such insurance contracts the phrase "including loading and unloading" is a phrase of extension and expands the expression "the use of the truck," somewhat beyond its connotation so as to bring within the policy some acts in which the truck does not itself play any part.[1]

The decisions generally follow six principles in construing this clause, namely:

(1) That the intention of the parties to the insurance contract should be a controlling factor.[2]

(2) That the terms of the clause are to be taken and understood in a plain, ordinary and popular sense.[3]

(3) That in determining the intention of the parties the policy should be considered and construed as a whole.[4]

(4) That if the policy is considered ambiguous and susceptible of more than one meaning it should be construed liberally in favor of the insured.[5]

(5) That a proximate causal connection must exist between the loading or unloading of the motor vehicle and the injury complained of.[6]

(6) That the problem cannot be predetermined according to a general rule but each case stands on its own bottom.[7]

In applying these principles some courts have pronounced and followed a liberal, "complete operation" doctrine, and others have adopted a more restrictive "coming to rest" doctrine.

The "coming to rest" doctrine assumes that "unloading includes the activity beginning with the removing or lifting the article from the truck and ending when the article is first set down and the movement which removed it from the truck ceases."[8]

This reasoning is set out in a Wisconsin case[9] in which coverage was denied for injuries to a pedestrian who fell into a sidewalk hatchway which was left open by employee of insured after he had carried beer from the truck through the hatchway. The injury occurred while the employee was inside the tavern having the sales slip signed. In the decision, it was stated:

"The stipulation to pay all losses and expenses imposed by law under the clause quoted does not carry the liability of the

[1] *Pacific Automobile Ins. Co. v. Collision Casualty Ins. Co.*, 161 P (2d) 423, (Utah 1945), 160 A. L. R. 1251.
Turtletaub v. Hdwe. Mutual Ins. Co., 62 A (2d) 830, (N. J. 1948).
Conn. Indemnity Co. v. Lee, 168 F. (2d) 1420 (1st C. C. A. 1948).

[2] Case cited supra Note 1.
American Casualty Co. v. Fisher, 23 S. E. (2d) 395 (Ga. 1942).

[3] *Babier v. National Casualty Co.*, 59 N. E. (2d) 798 (Ohio 1944).
Turtletaub v. Hdwe. Mutual Ins. Co., supra, N. 1.

[4] *Turtletaub v. Hdwe. Mutual Ins. Co.*, supra, N. 1.
Conn. Indemnity Co. v. Lee, supra, N. 1.

[5] *American Employers Ins. Co. v. Brock*, 215 S. W. (2d) 370 (Tex. 1948).
Conn. Indemnity Ins. Co. v. Lee, supra, N. 1.
Babier v. National Casualty Co., supra, N. 3.

[6] *Conn. Indemnity Ins. Co. v. Lee*, supra, N. 1.
Pacific Auto. Ins. Co. v. Commercial Cas. Ins. Co., supra N. 1.

[7] *Conn. Indemnity Ins. Co. v. Lee*, supra, N. 1.
Turtletaub v. Hdwe. Mutual Ins. Co., supra, N. 1.
American Oil & Supply Co. v. U. S. Cas. Co., 18 A (2d) 257 (N. J. 1940).

[8] *Pacific Auto. Ins. Co. v. Commercial Cas. Ins. Co.*, supra N. 1.

[9] *Stammer v. Kitzmiller*, 276 N. W. 629 (Wis. 1937).

insurer beyond what may be described as the natural territorial limits of an automobile and the process of loading and unloading it. When the goods have been taken off the automobile and have actually come to rest, when the automobile itself is no longer connected with the process of loading, and, when the material which has been unloaded from the automobile has plainly started on its course to be delivered by other power and forces independent of the automobile and the actual method of unloading, the automobile then may be said to be no longer in use. The precise line at which the unloading of the automobile ends and a further phase of commerce, such as the completion of delivery, begins after unloading may in some cases be difficult of ascertainment, but where, as here, the merchandise had been removed from the truck and considerable time had elapsed after anything was done which could reasonably be said to be connected with the actual unloading, there is no difficulty in limiting the responsibility of the insurer who covers loading and unloading operations."

The "coming to rest" seems to have been followed in the following cases:

Stammer v. Kitzmiller, supra, N. 9.

St. Paul Mercury Co. v. Standard Acc. Ins. Co., 11 N. W. (2d) 794 (Minn. 1943).

(Recovery denied for injury occurring while equipment being transported from sidewalk into building on theory that unloading ended when equipment was removed from truck to the sidewalk).

American Casualty Co. v. Fisher, 23 S. E. (2d) 395 (Ga. 1942).

Fisher v. American Casualty Co., 24 S. E. (2d) 229 (Ga. 1943).

(Holding that unloading was completed when a machine removed from an automobile had been carried into an office and placed on a desk; hence recovery denied for injury occurring during transportation of another machine from the office to the automobile).

American Oil & Supply Co. v. U. S. Casualty Co., 18 A. (2d) 257 (N. J. 1950).

(Recovery allowed for injury from explosion of bottle of acid when it was being placed on counter, having been removed from truck covered by policy).

Ferry Bros. v. Indemnity Co., 38 A (2d) 493 (Pa. 1944).

(Recovery denied, where insured's employee picked up can of ashes in a cellar, carried it to a sidewalk door, opened door, and injured a passing pedestrian).

Zurich Gen. Acci. & Liability Ins. Co. v. American Mutl. Liability Ins. Co., 192 A 387 (N. J. 1937).

(Recovery denied for injury to store owner who struck at insured's employee in altercation with deliveryman while delivered milk and ice was being placed in store owner's ice box).

Franklin Co-op v. Employers Liability Assurance Corp., 273 N. W. p. 809 (Minn. 1937).

(Recovery denied, where insured's employee removed milk bottles from truck, entered customer's building, placed milk on floor and injured plaintiff while pulling on ropes in attempting to use elevator).

Jackson Floor Covering v. Maryland Casualty Co., 189 A 84 (N. J.)

(Recovery denied to plaintiff injured when linoleum fell from hand truck being rolled into customer's building after having been removed from insured's delivery truck).

It is to be noted that in only one of these cases was recovery allowed.

The "complete operation" theory includes as loading or unloading the entire process and activity involved in the movement of articles from the place where insured's employees found the articles which are to be moved by truck, to the place where the employees of insured turn them over to the party to whom they are to make delivery.[10]

This doctrine is discussed in detail by the Montana Supreme Court in a 1940 decision:

In that case insured's employee, after barrel of beer had been unloaded from a truck, opened a cellar door from underneath, through which the beer was to be delivered. Pedestrian stepped on door just as it was lifted and was injured. The court held that the accident was covered by the liability policy covering the truck upon the following reasoning:

"We hold that under the facts here presented the unloading of the truck was a continuous operation from the time the truck came to a stop and the transportation ceased until the barrel of beer was delivered to the customer. The unloading of the truck cannot be said to have been accomplished when the barrel of beer was placed upon the sidewalk. As well might it be argued that the loading of the truck consisted merely of the act of lifting com-

[10] *Pacific Auto. Ins. Co. v. Commercial Casualty Ins. Co.,* supra.

modities from the ground to the body of the truck. The loading of the truck would contemplate much more than that. It would embrace the entire process of moving the commodities from their accustomed place of storage or the place from which they were being delivered until they had been placed on the truck. So, too, the unloading thereof embraced the continuous act of placing the commodities where they were intended to be actually delivered by use of the truck.'"[1]

The "complete operation" rule seems to have been followed in the following cases, in only one of which was recovery denied:

B. & D. Motor Lines v. Citizens Casualty Co., 43 N. Y. S. (2d) 486.

(Recovery allowed plaintiff struck by hand truck when cartons unloaded from insured's delivery truck were being rolled into building. Cf. *Jackson Floor Covering v. Maryland Casualty Co.*, supra).

Krasilovsky Bros. Trucking Corp. v. Maryland Cas. Co., 54 N. Y. S. (2d) 60 (1945).

(Recovery allowed for injuries resulting from falling of machinery being raised by a power winch in elevator shaft of customer's building).

Wheeler v. London Guarantee & Accident Co., 140 A 855 (Pa. 1928).

(Recovery allowed pedestrian who fell against end of steel girder which had been removed from insured's truck and placed on ground, and it was being pulled from time to time towards customer's building by use of the truck; held, delivery not completed until girder was placed inside customer's building).

Babier v. National Cas. Co., supra.

(Recovery allowed for damages to furniture struck by stove being carried by insured's employees from plaintiff's store to insured's truck).

Pacific Auto. Ins. Co. v. Commercial Cas. Ins. Co., supra.

(See discussion following).

State Exrel-Butte Brewing Co. v. District Court, supra.

Maryland Casualty Co. v. United Corp., 35 F. Supp. 570.

(Recovery denied, where oil, which had been unloaded from insured's truck to a tank, exploded after insured's truck had been driven away from tank).

Maryland Casualty Co. v. Dalton Coal, (USCA, 8th Cir. 34 AC 764).

[1] *State Exrel-Butte Brewing Co. v. District Court*, 100 P. (2d) 932, (Mont. 1940).

(Where the "loading and unloading" clause of the comprehensive automobile liability policy was held to cover the insured's liability arising out of his coal driver's failure to properly replace the metal disc of the sidewalk chute after the unloading of the coal had been completed. The law of Missouri was found to follow the so-called "complete operation" doctrine, as distinguished from the "coming-to-rest" rule.

(See also later cases discussed infra).

In some cases recovery was allowed without the specific adoption of either theory, since under either theory the accident occurred during unloading.[12]

The more recent trend of the courts seems to be towards the adoption of the principles of the complete operation theory. In the case of *Pacific Auto. Ins. Co. v. Commercial Casualty Ins. Co.*, supra, N. 1, previous decisions are collated. An informative note follows the report of this decision in 160 A. L. R. 1259.

In this case a pedestrian fell through an open trap door in a sidewalk through which insured's employees were lowering kegs of beer, all of the kegs having been taken off the truck previously and placed on the sidewalk. In its decision the Court seems to adopt the liberal viewpoint, stating:

"We conclude that the proper rule of construction of policies such as here involved is that the mission or transaction or function being performed by the insured's employees at the time of the accident is the controlling element in determining whether the situation from which the accident occurred is included in loading and unloading.

"The job being performed here, that part of the insured's business functioning at the time of the accident was that of making a proper commercial delivery. The policy of plaintiff included and the policy of defendant excluded the business of making commercial deliveries. Both policies treat the "use of the truck" as expanded to cover all activities involved not only in transporting and hauling but in doing all things in getting the articles onto the truck and off the truck, which were necessary and proper in making and com-

[12] *Thompson Heating Corp. v. Hardware Indemnity Company*, 58 N. E. (2d) 809 (Ohio 1944). In which a pedestrian stumbled over a hose through which rock wool insulation was being blown from a truck into a building, the blower being attached to the truck.

pleting the commercial delivery of the goods—all things which insured's employees were required to do in making delivery of the beer, and in which the truck involved as one of the media of transport."

All of the cases decided since the time of the above described annotation have been considered, and the majority of them either adopt the complete operation theory outright or their decision is based on a liberal interpretation of the policy.[13]

In all of these cases it was held that the acts causing injury were part of the loading or unloading of the motor vehicle covered by the policy.

In *American Employers Ins. Co.*, supra, injuries were sustained by a pedestrian who fell into an open sidewalk elevator shaft when employees in charge of insured's truck left the doors open while obtaining cross bars to guard the shaft, notwithstanding nothing had either been loaded onto or unloaded off of truck at the time of the fall. In this case the court held the acts were within the coverage of the policy on the truck, recognizing the two doctrines and saying:

"The fact that the construction of the loading and unloading clauses of these insurance contracts has projected such a conflict in the courts as to establish two rules or theories of construction, that is, the coming to rest theory and the complete operation theory, shows inescapably that the language employed is considered ambiguous and susceptible of more than one construction, hence should be interpreted liberally in favor of the insured and strictly against the insurer who wrote the policy."

In the *Turtletaub* case, supra, the court stated the general rules mentioned above and allowed a recovery under the policy for injuries sustained by one who was struck by insured's hand truck in the store of insured's customer when soda was being delivered on the hand truck from insured's truck. The court said "Unless it is agreed that the phrase loading and unloading is a phrase of extension—expanding the expression "use of the truck" somewhat beyond its construction, otherwise, so as to bring within the policy some acts in which the truck in and of itself does not play any part, the expression has no meaning.

In the *Coulter* case, supra, a garbage collector intending to carry a basket of refuse from a basement to a truck parked at the curb pushed upward on a sidewalk trap door causing a pedestrian to trip and sustain injuries. Under the complete operation theory it was held that these acts were within the coverage.

In the *Conn. Indemnity Company* case, supra, it was held that the opening of sidewalk elevator doors by the driver of express company's truck for the purpose of delivering parcels from truck to consignee by means of sidewalk elevators was an integral part of unloading the truck and that injury to one who fell into the open elevator well was proximately caused by unloading a truck. The court then said: "The term unloading means something more than the actual physical operation of taking something off of a truck. To decide otherwise would be to render the loading and unloading clause meaningless."

In *London Guarantee and Accident Co.*, supra, the employees of the insured were shoveling coal into a manhole. The coal had been dumped from a truck onto the street and a pedestrian tripped over a piece and was injured. The truck was at that time about 100 feet from the dumping place on its way for another load of coal to be dumped. Insured had contracted to deliver coal into the bin, which was a customary practice. The court recognized the two theories and adopted the complete operation theory saying:

"Under the plaintiff's contract in this instance, and its practice and contract in all instances, the unloading was not completed until the coal was unloaded into the bin in the basement. We hold that the complete operation doctrine should be adopted and applied to the case in judgment as better effecting the purpose of the policy and in keeping with the common understanding of its terms."

In *St. Paul Mercury Indemnity Co.*, supra, an oil tank truck had been driven to a sawmill to deliver fuel oil. While the oil was being removed from the truck to the power unit of the sawmill by a 5-gallon can, the unit overflowed, the oil became ignited, and set fire to the sawmill. The court held that the unloading had not been completed at the time of the fire, and al-

[13] *Conn. Indemnity Co. v. Lee*, supra, N. 5.
Coulter v. American Employers Ins. Co., 78 N. E. (2d) 131 (Ill. 1948).
American Employers Ins. Co. v. Brock, supra, N. 5.
London Guarantee and Accident Co. v. C. B. White & Brooks, supra.
St. Paul Mercury v. Crowe, 164 F. (2d) 270 (5th C. C. A. (1947).
Turtletaub v. Hardware Mut. Ins. Co., supra, N. 4.

lowed recovery under the liability policy on the oil truck.

A distinction between "unloading" and "deliver" has been made. In the case of *American Oil and Supply Co. v. U. S. Cas. Co.*, supra, the court said that "delivery" was more inclusive than "unloading." On the other hand, some courts have concluded that "unloading" means "delivery."[14]

In the *Babier* case[15] the court said:

"We think that loading begins when the employees of the plaintiff connected with the truck receive the article and as part of a continuing operation place it upon the truck, and that the unloading ceases when the article is taken from the truck by such employees and as part of a continuing operation is delivered to the customer or to the place designated for delivery."

In the *B. & D. Motor Lines* case[16] the court said: " . . . unloading continues, at least in a case like this (goods being moved through store on hand truck) until delivery is effected. . . . "

In the case of *Handley v. Oakley*, 116 P. (2d) 833 (Wash., 1941) an interesting situation developed. An ice cream company employee drove a truck to a baseball field, where it was put in full charge of a member of an organization sponsoring a celebration, and used in distributing ice cream to children, one of whom was struck by a foul ball while standing by the truck. Upon the grounds that use of the truck as a means of transportation had been completed, that the commodities in the truck had been delivered, and the truck was not being unloaded within the terms of a liability policy, and coverage under the policy on the truck was denied for the damages awarded to the child struck by the baseball.

A by-product of this "loading and unloading" problem is illustrated in the case of *Muller v. Sun Indemnity Company of New York, etc.* (96 N. Y. S. 2d 140, 276 A. D. 1028, affirmed by the New York Court of Appeals in January, 1951, citation not available). American "L-M-C" was on the risk with an M & C policy, Sun Indemnity Company having the auto coverage (there was also another public liability policy issued by Coal Merchants Mutual). These spectacular facts were involved: the insured, Muller, owned and operated a warehouse in Forest Hills, New York, using it for the storage of furniture and general merchandise. On May 4, 1948, he sent his employees with one of his vans to move a piano from the warehouse to a house in Flushing. The men moved the piano on a dolly from the truck to the house. While they were carrying the piano down the stairs leading from the ground floor to the basement of the house, a high pressure gas reduction valve located inside the foundation of the house was broken. As a consequence, gas escaped and was ignited by the furnace pilot light. The explosion leveled the building, causing the death of two persons, injuring others, and damaging a good deal of property. Muller brought a declaratory judgment action against all three insurers after they disclaimed. As was more or less expected, the "complete-operation" theory was followed throughout the litigation in construing the auto policy. Not so predictable, however, was the holding in of the other two policies, including "L-M-C," by both the Appellate Division and the Court of Appeals. This result means an overlapping between the auto coverage and the P. L. coverage, the latter being based on the "pick up and delivery" coverage afforded by an M & C policy. It had been hoped that the Court of Appeals would eliminate this overlapping of coverage.

In many of the cases referred to in this discussion, the insurer had disclaimed coverage and refused to defend action by the injured party against the insured, or had defended without waiving its right to deny liability, and the question of coverage arose in a suit by insured against insurer to recover for the damages which had been paid by the insured. In other cases, the question arose in an action by an automobile liability insurer which had paid the damages, against an insurer under a policy covering all liability of the insured other than that arising out of the "use of a motor vehicle." The procedure by which the question was raised had no apparent influence upon the decision of the court.

[14] *Turtletaub v. Hardware Mut. Ins. Co.*, supra, N. 4.
Babier v. National Casualty Co., supra, N. 5.
B. & D. Motor Lines v. Citizens' Cas. Co., supra, N. 5.
[15] Supra, N. 14.
[16] Supra, N. 14.

Drive Other Car Coverage

FLETCHER B. COLEMAN
Bloomington, Ill.

Prepared on Behalf of the Automobile Insurance Committee

THE first automobile liability insurance policy was written in 1898. The insurance policies issued today reflect the improvements and developments in automobile insurance policies as the automobile acquired its present status as the chief form of transportation in America.

Through the years, automobile insurance companies have enlarged the benefits and protection provided by automobile insurance policies to keep pace with the needs and requirements of the motoring public.

In the progressive development of automobile insurance policies, the companies recognized that policyholders would not confine their driving to the automobile described in the policy. They recognized a need for the insured to have protection while operating other automobiles. This resulted in the development of the Drive Other Car coverage.

This coverage was added to the National Standard Policy several years ago. It was designed to provide coverage during the casual operation of other automobiles as distinguished from the regular use of other automobiles.

The purpose of this section of the Automobile Insurance Law Committee report is to discuss the limitations or restrictions placed upon the benefits provided by the Drive Other Car coverage.

The policy provides that the Drive Other Car Insuring Agreement does not apply "to any automobile owned by, registered in the name of, hired as part of a frequent use of hired automobiles by, or furnished for regular use to the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;"

Regular Use

It should be observed that the Drive Other Car coverage does not apply to any automobile furnished for regular use to the named insured or a member of his household. Three cases have been presented to Courts of Appellate jurisdiction for the construction of the term "regular use."

The first case was *Farm Bureau Mutual Auto Insurance Company v. Boecher,* 48 N E 2nd 895 (1942). In that case the insured was employed by the Lynch Motor Car Company as a salesman. All of the cars held for sale by the Lynch Motor Car Company were available to their salesman for demonstration to a prospective purchaser and as a means of transportation between their homes and the garage. Under this practice, Mr. Boecher had the right to take any car owned by the Lynch Motor Car Company at any time for one of these purposes. Mr. Boecher took one of the cars to determine its driving condition and was involved in an accident. It was the first time he had operated this car, although he had used other cars frequently which were owned by his employer.

The Farm Bureau Mutual Auto Insurance Company insured Mr. Boecher's personal car and denied liability on the basis that cars owned by the employer were furnished to the insured for his regular use. A declaratory judgment action was filed and the Ohio Court of Appeals held that

"This use was so frequent as to be termed regular use. The automobile which he was operating at the time of the collision was in the same category as any and all of the other used automobiles. He could have used it not only on the night he drove it to his home, but the next succeeding day or succeeding days, for demonstration purposes, or again and again to drive to his home. So that it must be said that this automobile was within the terms of the policy furnished for regular use to Boecher."

The Ohio Court of Appeals held that the Company was not obligated to extend coverage under the Drive Other Car coverage. A petition for a rehearing was filed and this was denied.

In 1943 the California District Court of Appeals, Fourth District, passed upon the case of *Pacific Automobile Insurance Co. v. Lewis,* et al, 56 Cal. Appellate 2nd 597, 132 Pacific 2nd 846.

H. E. Wells was insured by the Pacific Automobile Insurance Company and the Mercer Casualty Company. He was one of several salesmen employed by Smith and

Haight. The salesmen did not own a car for demonstration purposes but were permitted to demonstrate any automobile owned by the sales agency. Personal use of demonstrators by the salesmen was discouraged, but was permitted on a limited basis to encourage the salesmen. Smith, one of the partners, sold his personal car and took one of the demonstrators for transportation to and from his home. This car was used by the partner at night and by Wells during the day as a demonstrator. On May 11, 1941, Wells asked the sales manager for permission to use the car to make a trip from San Diego to Pomona on personal business. The request was granted and while on this trip, Wells was involved in an accident.

The California District Court of Appeals held that this did not constitute regular use and that the Pacific Automobile Insurance Company and the Mercer Casualty Company were required to provide protection under the Drive Other Car coverage. Their attitude was expressed in the following quotation: "The most reasonable view of the situation is that, whatever may be said of other times and places, this car was not furnished for his regular use, insofar as this particular trip is concerned and that at the time and place in question the first exception provided by the clauses of the policy which are here in controversy was not applicable."

In 1945 the Appellate Court of Illinois for the First District passed upon the case of *Rodenkirk v. State Farm Mutual Automobile Insurance Company,* 60 N E (2nd) 269. H. F. Rodenkirk insured a Chevrolet in the State Farm Mutual Automobile Insurance Company. On July 20, 1941 he was involved in an accident while driving a Dodge automobile owned by John Meyer. H. F. Rodenkirk's daughter was engaged to John Meyer. In March of 1941 he entered the Army and before reporting he turned the Dodge automobile over to his fiancee, who lived with her father. She operated the car until it needed repairs, at which time she turned it over to her father. He repaired the car and used it from time to time.

The Insurance Company refused to extend coverage because the Dodge was furnished to the insured for regular use. The evidence developed that Meyer had talked to Rodenkirk before entering the Service and had authorized him to take care of the automobile while he was away and that he had told him that both he and his daughter could use the car. The Court held that "Meyer giving the car to Rodenkirk to use it as he saw fit would necessarily mean that the car was furnished to Rodenkirk for his regular use" and held that the Insurance Company was not oblgiated to extend coverage.

Household

There are several cases which construe the word "household" as it appears in the Drive Other Car insuring clause. There are many cases construing the word as it appears or has appeared in other sections of the policy.

The cases construing "household" as it is used in the Drive Other Car section of the policy will be placed in one classification and other cases will be grouped under a general heading.

The first reported case construing the word "household" in the Drive Other Car coverage is *Lumbermens Mutual Casualty Company v. Pulsifer,* 417 F. Supp. 249 (Maine 1941) 12 Auto Cases 607. The Company insured Louis Pulsifer and the policy was endorsed to extend Drive Other Car coverage. The endorsement provided that "the insurance does not apply to any automobile owned in full or in part by or registered in the name of the named insured or any member of the household thereof."

The insured was involved in an accident while driving a car owned by his son, Elton. The insurance company filed a petition for a declaratory judgment to determine its liability. The facts developed that Elton was married and had one child, and had lived at various places in the state of Maine.

In the latter part of 1940 he was out of a job, but had made arrangements for a job that would not be available for several weeks. Since he did not have any place to stay in this interim, arrangements were made for him and his wife and child to reside with the parents. The home was a single family dwelling, but each family had two bedrooms and they shared the kitchen and living room. The expenses were divided between the two families. The parents did not exercise any control over their son and his family. Louis Pulsifer owned and used his car independent of his son, and the son owned and used his car independent of the father. On the night of the accident, the son intended to use his car to get some milk. When it was time for

him to leave, he decided he was too tired to go out that evening and asked his father to take his (Elton's) car and get the milk. The accident occurred while Louis was driving Elton's car. This was the only time that Louis had driven Elton's car.

The Court held that the car was not furnished for the regular use of Louis and that Elton was not a member of his father's household. The explanation is as follows: "Here two families came together temporarily until the newcomer could find another place of abode, which was expected to be a matter of only a few weeks. There was no one head of both groups; no permanence; no pursuit of a common object; no such union of the two families as would make them one. It was a temporary arrangement for the convenience of the son and his family while getting located elsewhere. Each family retained its own organization under its own head and did not merge to make one family or one household in any such way as the word is used in the policy."

The word "household" was involved in the case of *Island v. Fireman's Fund Indemnity Company*, 172 Pacific 2nd, 520, affirmed in 184 Pacific 2nd, 153 (California, 1947) 28 Auto Cases 233.

The company issued a policy to J. C. Cave, Sr., containing the standard provisions with reference to Drive Other Cars coverage. J. C. Cave, Jr. was married and lived with his father. About four months before the accident the son entered the Army and left his car with his father. He asked his father to drive the car once in a while to "keep the battery up." The father was involved in an accident while driving the son's car. The company denied liability and the claimant sued the company as a judgment creditor for J. C. Cave, Sr.

The insured testified that he used the son's car about as much as his own in driving to and from work. The Supreme Court of California held that the son was not a member of his father's household. The Court conceded that the domicile or legal residence of a person is not affected by his enlistment in the Armed Forces, but stated that the decisions to that effect are not decisive upon the question of whether military service has any effect upon membership in a household as the term is used in an insurance policy. The Court held that Cave, Jr. was not a member of his father's household at the time the accident occurred. There is no indication in the opinion of the Supreme Court that the question of "regular use" was raised in the defense of the action against the insurance company.

In *Fleming v. Travelers Insurance Co.*, 39 Southern 2nd 885, 31 Auto Cases 760 (Mississippi, 1949) the defendant insured B. B. Stewart. The plaintiff was injured when Stewart was driving an automobile which belonged to his wife. The Company denied liability and refused to pay the judgment obtained against B. B. Stewart, and this action was filed by the injured party to collect the judgment.

Stewart separated from his wife in 1936. She continued to live in their home in New Orleans. He visited his wife's home on rare occasions at which time the wife would leave in order to avoid him. The accident occurred on January 26, 1941, at which time Stewart was maintaining an apartment in Mobile, Alabama. On this occasion Stewart took his wife's car and was driving it at the time of the accident. They were still married at this time. Stewart was not divorced by his wife until March, 1944. The Court held that Stewart was entitled to coverage, taking into consideration that the husband and wife were not living together under the same roof and that ambiguities must be construed favorable to the insured.

The California District Court of Appeals in the Fourth District relieved the company of liability in *Northwest Casualty Company v. Legg*, 204 Pacific 2nd 106, 31 Auto Cases 930 (1949).

The company insured H. C. Legg and O. H. Lightsey, doing business as The Kern Neon Company. The policy was endorsed to provide Drive Other Car coverage. The accident occurred on September 15, 1946, when H. C. Legg was driving a car registered in the name of Eleanor Johnson, who was the mother of Mrs. Legg. Mrs. Johnson lived with Mr. and Mrs. Legg until May 1, 1946. She became an invalid as the result of a stroke in Jannary, 1945 and was unable to drive her car thereafter. In September, 1945, Mrs. Legg sold her personal car and operated her mother's car for her personal use. On May 1, 1946, Mrs. Johnson went to live with a son but her car was left with her daughter. Mr. and Mrs. Legg testified that her mother left the car with them for her daughter's use. The Court held that "The evidence here clearly shows that this car was furnished for the regular use of Mrs. Legg, who was a member of Mr. Legg's house-

hold and with the only reasonable inferences therefrom adequately supports the finding here questioned."

The most recent case is *Aler v. Travelers Indemnity Company,* 34 Auto Cases, 945, 92 F. Supp. 620, in the U. S. District Court for the District of Maryland (1950).

The defendant insured James F. Aler and and the policy contained Drive Other Car coverage. The insured lived with his wife and son in Baltimore County. Mrs. Aler's mother lived in Indiana prior to 1948. In that year she sold her farm and went to live with her daughter in Baltimore County, making periodic visits with three sons. When she moved to her daughter's home in Baltimore County she moved all of her personal effects, including a Plymouth automobile. The Aler family used the mother-in-law's car from time to time and on November 23, 1949, Mr. Aler drove the car to work. The accident occurred that day while he was driving his mother-in-law's car. The trial Judge made the comment that "It is quite apparent that the automobile was furnished by the mother-in-law for its regular use not only for her own benefit, but for that of other members of the household. . . . It is quite clear on the facts found in this case that Mrs. Sharp, the mother-in-law, and the owner of the Plymouth automobile involved, was a member of the plaintiff's household."

THE FOREGOING DECISIONS CONSTRUE THE WORD "HOUSEHOLD" AS IT APPEARS IN THE DRIVE OTHER CAR COVERAGE. AUTOMOBILE INSURANCE POLICIES HAVE BEEN REVISED FROM TIME TO TIME AND IN THE DEVELOPMENT OF THE CURRENT AUTOMOBILE INSURANCE POLICY THE WORD "HOUSEHOLD" HAS APPEARED IN OTHER SECTIONS OF THE CONTRACT. THERE ARE DECISIONS CONSTRUING THE TERM "HOUSEHOLD" AS IT APPEARED IN THOSE SECTIONS, AND THOSE DECISIONS ARE HELPFUL IN CONSTRUING "HOUSEHOLD" AS IT APPEARS IN THE PRESENT DRIVE OTHER CAR COVERAGE.

AT ONE TIME THE DEFINITION OF INSURED, OR SO-CALLED OMNIBUS CLAUSE, PROVIDED THAT THE WORD "INSURED" INCLUDED NOT ONLY THE NAMED INSURED BUT ANYONE OPERATING THE DESCRIBED AUTOMOBILE WITH THE PERMISSION OF THE NAMED INSURED OR AN ADULT MEMBER OF HIS HOUSEHOLD.

The following cases construe "household" as it appeared in that section:

FEDERAL: *Ocean Accident and Guaranty Company v. Schmidt.* 46 Federal 2nd 269 (Kentucky, 1931).

The Company insured Henry Bradley, Sr. His son, Henry Bradley, Jr. was 24 years old. He lived with his parents but was self-supporting. The accident occurred when the insured automobile was being operated by Robert Clifton with the permission of Henry Bradley, Jr. The Circuit Court of Appeals reviewed the definitions of "household" in several dictionaries and concluded that Henry Bradley, Jr. was a member of the household of Henry Bradley, Sr. The Court held that the insurance company must extend coverage because the car was being operated with the permission of an adult member of the insured's household, stating, "We do not doubt that a son living under the parental roof is a member of the household, even though he has reached his majority and supports himself, but if any doubt existed the general rule of construction requires that it be resolved against appellant."

NEBRASKA: *Andrews v. Commercial Casualty Company,* 259 North Western 653.

The defendant insured Louise Marvin. The insured resided with her mother, Anna Daniels, and her brother, Fred Daniels. The accident occurred when the car was being operated by Fred Daniels. It was contended that he was driving the car with the permission of Anna Daniels, an adult member of Louise Marvin's household. The three contributed to the expense of the home. The Court held that it was not necessary for the mother to give Fred Daniels permission to use the car for the case to come within the omnibus clause because "Fred Daniels, being an adult member of the household, could give himself permission to use his sister's car within the meaning of the omnibus clause of the policy." The brother had operated the car on previous occasions without any objection by his sister.

OKLAHOMA: *Indemnity Insurance Company of North America v. Sanders,* 36 Pacific 2nd 271.

The company insured W. J. Supernaw. Herbert Walker married W. J. Supernaw's daughter and had been living with the in-

sured for a few days prior to the accident. On the day before the accident Supernaw and Walker drove to a farm owned by Supernaw to do some work. After arriving at the farm Walker asked to borrow the car to drive to town and transact some business. He was to return to the farm later in the day. He did not return, and the next day the car was involved in an accident, at which time it was being operated by Joe Brown. Walker was a passenger in the car at the time. The Company denied liability because the car was not being operated with the permission of the named insured or an adult member of his household. The question involved was whether or not Walker was a member of Supernaw's household. The facts developed that Walker and his wife established a home of their own when they were married. A few days before the accident, Walker became intoxicated and was away from his home for several days, and his wife returned to her parents' home. When Walker became sober he went to his father-in-law's home to attempt reconciliation with his wife. The Court held that Walker had established his own household and that when he married Supernaw's daughter she ceased to be a member of the Supernaw household and became a member of Walker's household. The Court reviewed several definitions of "household" and concluded that Walker was not a member of Supernaw's household and there was no permission for Joe Brown to operate the car, so as to bind the insurance company.

AT ONE TIME MANY AUTOMOBILE INSURANCE POLICIES PROVIDED THAT THERE WAS NO LIABILITY UNDER THE THEFT COVERAGE FOR THE THEFT OF AN AUTOMOBILE BY A MEMBER OF THE INSURED'S HOUSEHOLD. THE FOLLOWING CASES CONSTRUE THE WORD "HOUSEHOLD" AS IT APPEARED IN THAT CLAUSE.

ALABAMA: *Home Insurance Company v. Pettit,* 143 Southern 837.

The insured was a traveling salesman. When he was not traveling he resided with his father. When he was on the road he stored his car in a locked garage about 75 yards from his father's home. The insured's uncle was living temporarily in the Pettit home as a guest of the family. The insured and his uncle occupied the same room. The uncle obtained the keys and stole the car. The Court held that the uncle was not a member of the insured's household. It was pointed out that the insured did not invite the uncle into the home and had no authority to ask him to leave.

KANSAS: *Vaughn v. American Alliance Insurance Company,* 27 Pacific 2nd 212.

The insured automobile was stolen by the insured's son. The son had been confined to a penal institution and in October, 1931, he was paroled to the insured. The son resided with the father until the parole period expired in October, 1932 and thereafter until November 24, 1932 when the son departed. On December 14, 1932, the son and some accomplices returned to the insured's home and took the car and some other personal possessions. The Court held that the son had ceased to be a member of the insured's household in November and affirmed the judgment in favor of the insured.

MARYLAND: *Rydstrom v. Queen Insurance Company of America,* 112 Atlantic 586.

The insured's nephew lived in St. Louis, Missouri and in October 1917 became a student at the Bliss Electric Academy in Washington, D. C. The insured resided in Maryland and the nephew visited him several times between October, 1916 and February, 1919, when the nephew stole the car. On February 3, 1919, the nephew moved into the insured's home for a visit of unannounced duration. The nephew never paid any board during any of the visits and had complete freedom in the home. On February 7, 1919 the nephew obtained the car keys from his uncle's pocket and took the car, which was located later at Alexandria, Virginia in a wrecked condition. The company denied liability on the ground that the nephew was a member of the insured's household. The Court held the nephew to be a member of the household.

OHIO: *Heffernan v. Milwaukee Mechanics Insurance Company,* 169 North Eastern 33.

The car was owned and insured by Helen Heffernan. The car was stolen and a claim was filed with the insurance company. The company paid the claim. The car was located after the claim had been paid and it was discovered that the car had been stolen by the insured's husband. The insurance company filed suit to recover the amount of the payment because there was no theft within the coverage provided by the pol-

icy. Some time prior to this occurrence the insured had filed suit for a divorce and for alimony and support for the children. The husband filed a cross-petition. The Court refused to grant either party a divorce but made allowance for the support of the children. The husband and wife had not lived together for years when the husband stole the car. The company contended that since the bonds of matrimony had not been dissolved it was still one household. The Court held that there was a theft within the meaning of the policy.

TEXAS: *Barrett v. Commercial Standard Insurance Company*, 145 South Western 315.

Barrett sued the insurance company to recover for the theft of the insured automobile, which was stolen by his nephew. The nephew was an orphan and out of work most of the time. He stayed with the insured occasionally and the insured helped him from time to time because he was sorry for him. The insured had no home and lived with friends most of the time. His nephew would stay with the insured's friends and when the insured would move the nephew would follow him. The Court held that the fact that the insured helped his penniless nephew occasionally would not make him a member of his household and ruled that the theft of the insured car by the nephew was covered by the policy.

SOME INSURANCE POLICIES HAVE PROVIDED THAT THE POLICY DID NOT APPLY TO THE LIABILITY OF THE INSURED TO MEMBERS OF HIS HOUSEHOLD. THE FOLLOWING CASES HAVE CONSIDERED THE WORD "HOUSEHOLD" IN THAT SECTION OF THE POLICY.

FEDERAL: *State Farm Mutual Automobile Insurance Company v. James.* 80 Federal 2nd 802 (West Virginia, 1936).

The company insured Blanche Kessler. Aileen James was injured while riding in the insured automobile, which was being driven by the insured's daughter-in-law. Miss James sued Mrs. Kessler and obtained a judgment which the insurance company refused to pay because it contended that she was a member of the insured's household. The plaintiff and the insured were not related by blood or marriage. The plaintiff entered the insured's home several years before the accident. The plaintiff worked for three years and paid board all of that time. She lost her position and she had continued to stay with the insured most of the time. After she lost her position she had little work and paid no board. She helped with the house work and the family sewing. She slept with the insured's daughter, ate her meals with the family, went to church with them and went on many trips with the insured in the insured automobile. On the day of the accident she had helped the insured prepare some refreshments to be served at the Church. The Court held that the plaintiff was treated as a member of the family group, sharing their daily tasks and enjoying the social intercourse of the domestic circle. It held that "household" is not limited to persons related by blood and that the company was not liable because of the exclusion clause.

MINNESOTA: *Engebretson v. Austvold*, 271 North Western 809.

This was a suit brought by a mother against her daughter. The daughter married in 1931 and moved to Montana with her husband. He died in 1933 and she returned to her parents' home in Minnesota. The plaintiff was injured while riding with her daughter and the company insuring the daughter denied liability because the plaintiff and the insured were members of the same household. The mother sued the daughter and recovered a judgment. An attempt was made to collect the judgment from the company because the daughter did not intend to make her home with her mother. When she probated her husband's estate she gave her mother's home as her address. In 1933 she matriculated at the University of Minnesota and gave her mother's home as her address. After graduating she taught school near her parents' home and lived with them. She slept with her sister and enjoyed all of the privileges of the home. The Court held that they were members of the same household.

MINNESOTA: *Pearson v. Johnson*, et al, 10 N. W. 2nd 357.

E. L. Pearson owned an automobile which was insured in the State Farm Mutual Automobile Insurance Company. Oliver L. Johnson owned an automobile which was insured in the Western Casualty and Surety Company. Mrs. E. L. Pearson was injured while riding in her husband's automobile which was being driven by Johnson with Pearson's permission. The State Farm Mutual policy provided that the policy did not apply to any obligation for which the insured might be held liable to "any member of the family of the in-

sured residing in the same household as the insured." Western Casualty policy included Drive Other Car coverage with the usual provision that it was excess insurance over any other valid and collectible insurance. State Farm Mutual denied liability because of the policy provision. Western Casualty denied liability contending that the State Farm policy applied and that its insurance was excess. Mr. and Mrs. Peterson were living together as husband and wife, and the Court held that the State Farm Mutual exclusion applied and that Western Casualty and Surety was obligated to pay the judgment obtained by Mrs. Pearson. The Court stated "Inasmuch as State Farm Mutual has no liability to Mrs. Pearson, it follows that Western's liability cannot be secondary thereto."

NEW HAMPSHIRE: *Cartier v. Cartier,* 153 Atlantic 6.

The company insured George Cartier. He lived with his father, mother, brother and sister in a home owned by the mother. All paid board to the mother. The brother was injured while riding with the insured in the described automobile. The company denied liability because the policy excepted liability for "accidents to members of the assured's household." It was contended that the accident was covered by the policy because the clause dealt only with the household of which the insured was the head and more than a mere member. The Court held that this contention was contrary to the natural meaning of the word "household" and relieved the company of liability.

PENNSYLVANIA: *Hoff v. Hoff,* 1 Atlantic 2nd 506.

The insurance company insured an automobile owned by I. J. Hoff. His daughter-in-law was injured while riding in the automobile. The policy provided that I. J. Hoff was insured against claims for bodily injury or death resulting therefrom "accidentally inflicted upon any person or persons excepting agents, members of the insured's family, etc." The policy defined a member of the insured's family as "any person residing in the same household with the assured and related to him by blood or marriage, etc." The insured's son, Franklin Hoff and his wife Olive, moved into the I. J. Hoff's home several months before the accident. The son and his wife furnished the rooms they occupied with their own furniture, with only the kitchen and bathroom being used in common. Most of the time separate meals were prepared but occasionally both families ate together. They had separate accounts at the grocery store, bought their milk from different dairies and there were two sets of laundry and cleaning equipment. The Court commented that if the two families had lived in separate houses that there would have been two households and the fact that the two families arranged to live in one dwelling would not necessarily result in the creation of one household. The Court held that Olive Hoff was not a member of her father-in-law's household and that the insurance company was required to extend coverage to I. J. Hoff.

In addition to the foregoing cases there is an interesting case in Washington in which the term "household" was involved. The case is *Collins v. Northwest Casualty Company,* 39 Pacific 2nd 986. The defendant insured Mrs. Wallace Collins. She maintained a home in Seattle and her son, Frederick, and a housekeeper lived with her. Another son, Wallace, maintained his own home in that city. The policy provided that the terms and conditions of the policy were extended to be available to anyone operating the insured automobile with the permission of the insured or an adult member of the named insured's family.

Mrs. Collins died on May 12, 1932 and in her will she bequeathed the automobile to her son Wallace. Before the will was probated Frederick Collins was driving the car with Wallace as a passenger and the accident accurred, resulting in injuries to Wallace. The insurance company denied liability on the basis that Frederick Collins was not entitled to benefits of the terms and conditions of the policy because the car was not being operated with the permission of the named insured or an adult member of her household. The Court sustained the defendant insurance company, stating, "Our conception of a household involves the existence of a householder as its head, whose personality gives life to that small social unit. Without a householder, there is no household. Upon the death of the householder, the house may remain with its effects and its other members but it is no longer the household of its former head. . . . The policy was written to protect, first, Mrs. Collins, and secondly, those to whom she should give permission, directly or through the agency of a member of her household. When she died her household was at an end."

ARISING OUT OF THE OPERATION OF THE AUTOMOBILE, REPAIR SHOP, ETC.

The Drive Other Car coverage provides that it does not apply "to any accident arising out of the operation of the automobile repair shop, public garage, sales agency, service station or public parking place." This clause was interpreted in the case of *Buxton v. Randel,* et al, 159 Kansas 245; 154 Pacific 2nd 129. (1944).

The Phoenix Indemnity Company issued a policy to Arthur F. Randel and the Golden Rule Oil Company. The insured was a traveling salesman for the Oil Company. A friend of his had left his car at the warehouse to have a new set of tires installed. The insured was at the warehouse when his friend called and asked the insured to deliver the car to him. The insured consented and while he was driving his friend's car from the warehouse to meet his friend the accident occurred. Suit was filed against the insured and an attempt was made to recover the amount of the judgment from the Phoenix Indemnity Company. The company denied liability on the basis that the Drive Other Car coverage did not apply because the insured was an employee of the Golden Rule Oil Company and that the accident arose out of the operation of the sales agency. The Court held that there was no coverage.

The New Garage Policy

FREDERICK C. WARDLE
Detroit, Michigan

Prepared on Behalf of the Automobile Insurance Committee

AN Automobile Garage Liability Policy as originally written and sold by the insurance companies was definitely a single interest policy. This situation existed until very recently. It has now been changed to such broad coverage in the new Garage Policy that claims men and attorneys in the insurance field have had to completely revise their thinking and approach to claims now covered under the new policy. No longer is it a single interest proposition, but tends to approach in its coverage and scope the most liberal Comprehensive Automobile Policy written for a private individual.

The new Garage Policy has eliminated several troublesome adjustment phases by extending coverage, generally speaking, not only to employees but also to other individuals, including customers under certain circumstances, all of whom, from a practical point of view, are necessary adjuncts to the operation of a garage business, especially the garage business of a car dealer. The changes in these respects have been so great that until the adjuster or claims attorney becomes entirely familiar with the new broad form of coverage, it is almost necessary to re-check the policy each time a claim is presented.

The old familiar coverages in the policy have been broadened and new coverages have been added. These coverages can be set up in four fundamental divisions:

A—Bodily Injury Liability. The Bodily Injury Liability is governed by the standard insurance agreement based upon accidental injury and legal liability being divided into three divisions, optional with the insured, designed to give the best overall protection to the particular insured's type of operation.

Division 1, entitled *"Premises — Operations—Automobiles,"* is comparable to what formerly was designated as an Automobile Dealer or Repair Shop. This coverage includes the ownership, maintenance or use of the premises and all the operations necessary or incidental thereto; also, the ownership, maintenance or use of any automobile in connection with the above defined operations and an occasional use for other business purposes and the use for non-business purposes of any automobile owned by or in charge of any insured and used principally in the above defined operations. The most recent change in the Division 1 of definition of hazards is the addition of the following language: "Any automobile owned by the named insured in connection

with the above defined operations for the use of the named insured, a partner therein, an executive officer thereof, or a member of the household of any such person."

Division 2, entitled *"Premises—Operations—Automobiles Not Owned or Hired,"* replaces the old Storage Garage and Service Station Coverage and provides the same Premises and Operations Coverage as Division 1 and includes automobiles used in connection with the defined operations if such automobiles are not owned or hired by the named insured, a partner or an employee of the household of any such person.

Division 3, entitled *"Elevators,"* covers the ownership, maintenance or use of elevators at the premises.

The foregoing provisions, which on their face are self-explanatory, are in themselves much broader than the original Garage Liability Policy. The major difference, however, in the present version of the Garage Liability Policy, with its extremely broad coverage, in this respect lies in the definition of insured. By definition, the unqualified word "insured" now includes not only the named insured but any partner, employee, director or stockholder thereof, while acting in the scope of his duties as such, and any person or organization having a financial interest in the business of the named insured covered by the policy, and any person while using an automobile covered by this policy, or any person or organization legally responsible for the use thereof provided, of course, that such use is with the permission of the insured. The only exclusions under the Bodily Injury Coverage to the foregoing are the standard exclusions under the ordinary policy relative to injury, etc. of any employee and to cars owned personally by a partner, employee, director or stockholder.

It is thus seen that under the definition of "Insured" Bodily Injury Coverage is now extended to anyone using an automobile owned by the named insured, whether he be an employee, member of the family or even a customer who might be loaned an automobile of the insured while his own car is undergoing repairs. The coverage extended to a customer under this feature of the Garage Policy will ordinarily be primary coverage, as the standard provisions in a Comprehensive Automobile Liability Policy for a private individual relative to either his Drive Other Car Coverage or coverage afforded while his own car is temporarily laid up is an excess coverage to other valid insurance that may be on a car he is temporarily driving and which is not owned by him. The definition of insured under the insuring agreements also includes any person while using an automobile covered by the policy.

It is also noted that another change has taken place relative to automobiles owned by the named insured which actually are used as pleasure cars most of the time by members of his family. It is common practice for an automobile dealer to use a new car, or have some member of his family use it while retaining the title in the name of the dealership and later the automobile is sold as a used car. This was a point that continually gave rise to an argument between the insured and the insurance company under the old policy, which excluded such automobiles when used primarily for pleasure and personal purposes. It was always difficult for the adjuster or claims attorney to determine whether such car was used mainly in the business or not. The change in this respect no doubt came about because the insurance companies took a more realistic viewpoint, as opposed to theory, on the real coverage that was afforded under a Garage Policy despite the restrictive langauge employed in the old Garage Policy. The exposure, after all, for such automobiles used a considerable part of the time for pleasure or personal use, which were titled in the name of the garage, was really no more than the company had upon such cars directly and without question used in the business of the garage. There was the additional competitive problem in that respect, as many companies without change in the language of their policy, took the position that they would interpret their policy to cover such pleasure use by members of the family of the dealers and thereby produce a satisfied insured for very little additional exposure and, at the same time, avoid the claim problem that arose when the garage was questioned as to the amount of time the car was used on various activities.

The extension of the coverage to include an employee was only a natural one, as invariably the claimant looked to the garage for reimbursement when a claim arose in the operation of a garage-owned car by an employee on its business. Certainly, few insureds would willingly permit recovery of the loss from the employee after the insurance carrier paid on behalf of the garage. It was definitely to the advantage of

the insurance company, from a cooperation point of view, to extend such coverage to the employee. No such employee was very happy when he found that having been involved in a serious accident while on the business of his employer the insurance policy of the employer extended no protection to him. He also knew or soon learned that his own automobile policy excluded coverage to him while on garage business, and thus was left with no insurance protection at all. The psychology in that respect was very poor and frequently tended to embarrass the insurance carrier in the handling of a serious claim when counsel for the driver entered the picture, as they were then interested not only in defeating the claim but in making sure that the loss was saddled upon the garage in any event. Some companies, as a matter of good tactics in those cases in which suits developed, provided practical protection to the driver by employing counsel for him in order not to be at cross purposes with independent counsel which such an employee might engage. Certainly, from a practical point of view, no real additional exposure has been added at all. Under the former wording in the exclusion clause of the policy the coverage did not apply to any automobile while rented to others by the named insured. This exclusion clause has now been amended by adding "unless to a salesman for use principally in the business of the named insured." It therefore will be apparent that another troublesome situation has been corrected.

B—Property Damage Liability. All the comments made relative to the Bodily Injury Liability are also applicable to Property Damage Liability, with the addition that there are also the usual standard exclusions relative to damage to property owned by, rented to, in charge of, or transported by the named insured; excepting of course as to the aforementioned Division 3 of Hazards.

C—Automobile Medical Payments Coverage. This is an entirely new coverage, optional with the insured, which has been added to this type of policy as it has been added to many other forms of Automobile and General Liability Policies within recent years. It is a further extension of the Medical Payments Coverage to commercial risks such as is now afforded in a General Liability Policy on business establishments and in other fields of casualty coverage. The coverage in this respect is not a liability coverage at all, but, within the limits, will pay the necessary medical, surgical, ambulance, hospital, professional nursing and funeral services for such persons as may sustain injury or death in accordance with the standard provisions in the individual policy written for private passenger automobiles. It is possible in addition to have this Medical Payments Coverage extended to premises under the Garage Liability by the proper endorsement.

D—Property of Others in Charge of Named Insured. This Coverage is now embodied in the policy to cover the insured's legal liability for damage or injury to or destruction of property of others caused by accidental collision or upset of such property while in charge of the named insured in connection with his usual garage business. This Coverage is self-explanatory and is normally written on a deductible basis.

It is thus seen that the Garage Liability Policy has now caught up with the trend already evident in other forms of casualty insurance to give to the insured the broadest possible coverage suited to the particular line of work in which he may be engaged and to eliminate from the policy most, if not all, of the so-called technicalities of coverage which, from a practical point of view, did not really change the exposure. The exclusions have been decreased to a minimum in line with the standard exclusions of other forms of automobile insurance. The policy, as a whole, has become much more workable, not only from the insured and producer's end, but certainly from the Claim Department's end. Familiarity with the present new Garage Policy indicates that coverage on claims can now be more definitely and absolutely ascertained. More efficient handling should result when all phases of the particular case now tend to be covered by the one company without regard to side issues which formerly arose when various participants in the claim were not extended coverage under the policy.

Report of the Aviation Law Committee

IN THE 1948, 1949 and 1950 Reports of this Committee, attention was called to the tenacity of those who insist upon setting aviation apart from its competing forms of transportation by imposing upon it a different standard of liability. That situation continues with respect to international treaties and other federal legislation that affect the liability of aerial operators but is improving somewhat with respect to state legislation.

In the international field, the Warsaw[1] and Rome Conventions[2] still occupy the spotlight. The historical background, provisions and some of the controversial points were discussed in some detail in the 1950 Report.[3] They will not be repeated here. The present (May 1951) situation is as follows:

It will be recalled that the so-called Rome Convention covers damage caused by aircraft to third parties on the surface. It was signed in Rome in 1933 but in the intervening years has not been ratified or adhered to by the United States or enough major powers to make it of any value.[4]

Both the original Convention and the proposed revision violate just about every legal precedent we North Americans have learned to cherish as just and equitable. Recent London advices indicate that the organization representing all nations writing international aviation insurance, is opposing ratification. The best informed opinion in Europe is that the Convention "is being used by international jurists as the thin edge of the wedge to destroy the whole basis of private enterprise insurance, which is based on a contract made in good faith between the insurer and insured."[5] It is believed that most of the American aviation insurance market has expressed disapproval but is of the opinion that active opposition should come from the aviation industry since that industry is primarily affected.

The International Civil Aviation Organization Legal Committee completed the final draft, as far as that Committee is concerned, during its Seventh Session at Mexico City from January 2nd to January 23rd, 1951 and has submitted it to the ICAO Council with the recommendation that it be submitted either to an ICAO special Assembly or to a special conference of representatives of the interested nations during September, 1951 for finalization and opening for signature and ratification or adherence by the nations.[6] The Council decided that a special conference should be convened to consider the draft and comments from member nations as close as possible to June, 1952.[7]

It is therefore evident that the proponents of this treaty are going to press it for immediate action. The Rome Convention has been so bad that it received no ratification by most of the nations for nearly twenty years—1933-1951. From the standpoint of American precedent—both in law and political ideology—it is now much worse. Nevertheless, because international civil aviation has been delegated to ICAO, which has 58 nations (mostly socialistic) as members, and since ICAO will actively press for ratification in these 58 nations, there is little doubt that most countries will ratify unless stopped by influential and informed opposition. It is about the same situation as in the United Nations.

Many of the objections cited in our 1950 Report are either continued or increased:

(1) Unwarranted invasion of the sovereign rights of individual states to control the remedy, with respect to torts committed within any such state, which is available to the citizens of that state. This is a local, not an international, matter.

(2) Discriminates against aviation since U. S. A. law does not impose similar liability on other competing forms of transportation.

(3) Absolute liability, which is generally repugnant to established U. S. A. law, is imposed upon aviation without the compensation of a reasonable limit to the amount of damages for the liability so arbitrarily imposed. Such liability is not ordinarily imposed by U. S. A. law on other competing forms of transportation.

[1] 48 Stat. 3000 (1934); 1934 USAvR 239. Available from Supt. of Documents for 10 cents. Ask for Treaty Series No. 876.

[2] 1933 USAvR 284, 47 Treaty Info. Bulletin 27.

[3] July 1950 Insurance Counsel Journal 326. See also 1950 ABA Sec. of Ins. Law Proceedings 303.

[4] Only Belgium, Brazil, Guatemala, Rumania and Spain are adherents.

[5] Quote from the most experienced Insurance Counsel in Europe.

[6] VIII Resolutions 1 (d) DOC 6031 LC 129 23/1/51.

[7] ICAO May 1951 Monthly Bulletin 7.

(4) Last year's drafts (Taormina and Montreal) set two standards of liability—absolute, with a limit on indemnity three times that provided in the original Rome Convention (although deperciation of currency value in terms of the gold standard provided by the Convention had just about equalled rising costs) and tripled that triple limit up to a maximum of $1,200,000. U. S. currency, in case fault was proven. Even that lip service to U. S. A. law which bases liability on fault was abandoned at Mexico City. The present draft provides only absolute liability; up to a limit of 10,000,000 gold francs, or $663,350. U. S. cy. In other words, they took the limit on absolute liability, which had already been tripled in 1950 (to 6,000,000 fcs.) and almost doubled it again to 10,000,000 gold francs (.066,335 U. S. cy.). Any subsequent changes will more likely raise this limit than reduce it.

(5) One improvement was made. While the 1950 drafts eliminated any limit on injury or death of an individual—except the over-all maximum limit on any one accident—the Mexico City draft places a limit of 300,000 francs (nearly $20,000) which is nearly 2½ times the Warsaw Convention limit of 125,000 francs and sets a precedent that will strongly influence the raising of the limit in that Convention, now under consideration, but even this high limit is an improvement.

(6) The 1950 draft was not declared to cover all liability—only that of the operator. It is hoped that this is improved by Article 9 which states that neither the operator, owner, servants or agents shall be liable otherwise than expressly provided in this Convention—except when done with intent to cause damage.

(7) The Convention still does not protect or affect the liability of an operator while flying over the territory of his own nation. This means that the U. S. A. airlines would be totally without the protection (if any) of the Convention for accidents in the U. S. A. (where we have unlimited liability and supposedly higher verdicts) whereas competing foreign airlines would enjoy such protection in the U. S. A. as the Convention affords.

(8) No defense of value (for instance, the practically impossible contributory negligence of the person on the surface) is permitted to avoid the absolute liability provision. Even in cases like several recent instances, where military planes flew into and destroyed airliners which were completely without fault or a third party places a bomb aboard a plane, liability would still be imposed. The final result is that although the air carrier is engaged in a legitimate operation declared by Congress to be in the public interest[8] and using the air which has been legally declared to be a public highway,[9] he is made the insurer of any personal or property damage in connection with his flight—regardless of fault and for excessive amounts and in direct conflict with established American law.

The Warsaw Convention, as predicted in our last Report, was not considered seriously in Mexico City. However, the ICAO Legal Committee has now advanced consideration of revision of this convention to the preferred place on its agenda. If a conference or special Assembly is not called by the ICAO Council in September, 1951 to consider the Rome revision, the Legal Committee will at once begin deliberations on the Warsaw Convention. In any event it is scheduled to be taken up not later than early 1952 and therefore claims immediate attention. Since some seven revisions have already been submitted by Reporteur Beaumont, each somewhat different from the other, this Committee will not discuss the Warsaw revision until it becomes more definite as to just what changes will be actually considered.

The improvement with respect to domestic legislation referred to is in connection with state legislation. Literally hundreds of bills are introduced each year in federal and state legislatures, but those of particular interest to insurance lawyers are acts annuling the antiquated absolute liability law as to damage to persons and property on the ground; the passage of guest statutes similar to those applicable to automobiles; in passing financial responsibility laws instead of laws providing for compulsory insurance, and in passing laws covering service on out of state residents.

Reports from 1951 legislatures are not complete when this Report is being prepared in May, but bills have been introduced in a number of states affecting the above subjects favorably. Vermont actually passed an amendment to Sec. 5302 of the 1947 statutes, effective June 1, 1951, deleting the word "absolutely" and "whether such owner was negligent or not" from the provision creating liability on

[8] 49 U. S. Code 401.
[9] U. S. v. Causby, 328 U. S. 256.

the owner of an aircraft for damage or injury on the surface. Obviously it was the intention of the legislature to repeal absolute liability but it appears questionable whether or not this was accomplished for the owner is still declared liable and only the remotely possible defense of contributory negligence is provided.

The federal law of most danger appears to be H. R. 1985 which, among other things, attempts to invade states' rights by supplanting local laws by substituting a Federal Death Statute which would, among other things, void their laws limiting recovery in case of wrongful death. Your Committee studied this bill as H. R. 9869 of the 81st Congress.

In the field of domestic litigation, under the leadership of Vice Chairman, C. Clyde Atkins, the Committee finds that nothing of startling moment has developed in personal injury actions involving aircraft during the past year. The trend towards higher verdicts has been reflected in the few suits that have resulted in verdicts. It is suggested that the following cases may be of interest.

In *Small v. Transcontinental & Western Air, Inc.*, 3 Avi. 17, 216 Pac. (2d) 36 (Cal. Ct. of App. March 10, 1950) a fare paying passenger accused the airline of negligence in having failed to turn on the sign reading "Fasten Seat Belt" when the plane hit bumpy weather after leaving Amarillo. During the flight, the plane encountered a rapidly descending air current so that it dropped straight down and then abruptly surged upward. The drop was so fast that the hostess flew to the roof of the plane and fell to the floor covered with coats. Most of the passengers "like men on flying trapezes," shot out of their seats, up in the air, and then down on the floor or into other seats not their own. Pilots said it was smooth and routine. In affirming the judgment for plaintiff upon a verdict for $7,500 the court, without a mention of proximate cause or contributory negligence and without citation of authority, found it to be the duty of a prudent pilot to take whatever precautions are necessary to guard against such commonplace manifestations of the Almighty.

The case of *Long v. Clinton Aviation Company, Inc.*, 3 Avia. 17, 130 F2d p. 665 (CCA 10, March 6, 1950) involved a collision between two taxiing private airplanes, one a Stinson, the other a Cessna. The Cessna struck the Stinson on the left side, either at right angles or from the left rear. Suit was brought against the owner of the Cessna by the owner and operator of the Stinson and his guest passenger, who had been seated next to him on his right. Defendants pleaded, among other things, contributory negligence on the part of both plaintiffs and that negligence of the Stinson's owner and pilot was the sole proximate cause of the collision. Defendants also sought damages for injuries to the Cessna by way of counterclaim. The trial court directed a verdict against plaintiffs on their cause of action and against defendants on the counterclaim without mentioning any act or omission of the guest passenger plaintiff as constituting contributory negligence. The Court of Appeals reversed, largely because the totality of evidence presented a jury question.

In so doing, Chief Justice Bratton held, as a matter of law, that contributory negligence of a host cannot be imputed to a guest so as to bar recovery by the guest from a negligent third person. In addition, however, he pointed out that a guest has a duty to exercise ordinary care for her own safety, but that her failure to look to the left and see the approaching Cessna in time to warn her host of the danger was not contributory negligence.

Perhaps most important of all, the court discussed the duty of a pilot. The trial court erroneously thought that an airplane pilot must use extreme care. Judge Bratton said, however, that a pilot need use only the reasonable and ordinary care required by the circumstances.

In *LeJeune v. Collard, d/b/a Lake Charles Aviation*, 3 Avi. 17, 44 So. (2d) 504 (Ct. of App., La. Feb. 17, 1950) an action was brought to recover damages from a flying school for wrongful death of a student who was killed when the plane he was piloting crashed during a cross country solo flight. It was held, in conformity with courts generally throughout the United States that the doctrine of *res ipsa loquitur* could not be applied because defendant did not have possession or control of the plane at the time of the accident and because, from ought that appeared, the accident might have been caused by negligence of the student.

On the other hand, *res ipsa loquitur* was held to apply when a fuel tank, or any other object, falls from an airplane. Evidence of routine inspections does not necessarily overcome presumption of negligence where an object falls from a plane. *D'Anna v. United States*, 3 Avi. 17, 181 Fed. (2d)

335 (CCA4, April 11, 1950). A Maryland statute making owner prima facie liable in such cases also assisted plaintiff whose claim was prosecuted under the Federal Tort Claims Act. There seems to be no question that the state substantive law applies in such proceedings.

In *Shook v. Beals,* 3 Avi. 17, 217 P2d 56 (Cal. Ct. of App., April 13, 1950), plaintiff recovered damages for destruction of his plane by negligence of bailee pilot and his four joint adventurers to whom the pilot's negligence was properly imputed. Plaintiff rented the plane for $100 and four of the defendants issued checks to him personally for their share. In addition, there was evidence to show that all discussed the propriety of landing at the field where the accident occurred. From these facts, the court found a joint venture and that such was not overcome by merely showing that only one of the defendants was a licensed pilot who knew how to fly the plane. Thus while each must have a right to control, meaning power to determine a change of route, it is not necessary that each have power, right or ability actually to operate the plane. Of course, the other elements of joint venture were also discussed and found to be present. Their trip was for a common and non-business purpose and their common destination was a fishing hole.

Blue v. United Air Lines, Inc., 3 Avi. Cases 17, 98 N. Y. S. (2d) 272 (N. Y. Supreme Court, May 10, 1950). Action was brought against an air carrier, United, to recover damages arising from an accident involving one of the carrier's aircraft, which was alleged to be improperly designed and unfit for its intended use. United filed a cross-complaint against the manufacturer Douglas Aircraft Company, Inc. on two theories, viz. (1) breach of warranty, and (2) common law liability irrespective of warranty. Recovery over was sought if plaintiff recovered from United. The court held the cross-complaint good, as against a motion to dismiss, on both theories. On common law liability court cited *Iroquois Gas Corp. v. International Railway Co.,* 240 App. Div. 432. *Lewis et al v. American Airlines, Inc.,* 3 Avi. Cases 17, 91 Fed. Supp. 31 (U. S. Dist. Ct. So. Dist. of N. Y. March 20, 1950).

Miner v. Western Casualty and Surety Company, 3 Avi. 17, 41 N. W. (2d) 557 (Iowa Supreme Ct. March 7, 1950).

Suit against insurance company under a policy for hospital and surgeons' treatment and five and one-third months' total disability. Suit was for a declaratory judgment, a decree construing and interpreting the policy, for final adjudication and general equitable relief, and by amendment, for reformation on the grounds of misrepresentation by sales agent, a mutual mistake.

Plaintiff based his claim on his aviation accident policy and a rider called "Total Disability and Students, Private and Commercial Pilots" rider, which provides:

> "In consideration of the premium for which this policy is issued, it is understood and agreed that this policy is extended to cover the insured if such injuries are sustained by the insured by being struck by any aircraft, (or while in, on, operating, handling, or in consequence of making a forced descent from one while insured is a passenger or member of the crew of a plane piloted by a qualified pilot) or while in, on, operating, handling, or in consequence of making a forced descent from or with any powered aircraft having a valid NC Airworthiness Certificate issued by the Civil Aeronautics Administration."

Defendant contended that plaintiff was not a member of a crew, the airplane did not have a valid airworthiness certificate, and pilot did not have a current certificate of competency.

Plaintiff managed and operated airport and gave flying instructions, serviced planes by fueling them, tied them down at night and assisted pilots in starting them. Hall, who kept a plane there part time, asked him to help him start it. He twisted the prop and unknown to him, ignition switch had been left on. Prop caught his arm, breaking it.

The court held: (1) He was a member of "ground crew." (2) Under the rider it was not necessary to prove plane's airworthiness certificate while on the ground, and (3) Pilot did hold valid certificate.

The Canadian case of *Grossman and Sun v. The King,* 1951 1, Dominion Law Reports, P. 168 enunciates the following rule, which is substantially that prevailing in U. S. A. courts:

> "Where an airport is open to public use, a pilot who intends merely to land

there is a licensee only qua the airport operator, especially in the absence of evidence that a fee was chargeable or that other services or supplies were available which the pilot sought. The duty of the operator to a licensee is to inform him of any danger of which the operator knows or ought to know, and which is not known to the licensee or obvious to him, he using reasonable care." The pilot was using the airport for the first time. Without "dragging" the field to look it over he landed and rolled into a drainage ditch which was plainly marked with red flags on poles. The court held that "he was not entitled to assume that an unknown runway was of suitable length for safe landing or was otherwise free of hazards at a particular time. Had the pilot here used reasonable care, the danger would have been obvious and hence his claim for damages failed."

Respectfully submitted,

GEORGE W. ORR, *Chairman*
C. CLYDE ATKINS, *Vice Chairman*
JOHN J. WICKER, JR., *Vice Chairman*
FORREST A. BETTS
L. ST. M. DUMOULIN
RUSSELL C. GAY
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WILDER LUCAS
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W. PERCY MCDONALD
PHILIP J. SCHNEIDER
HOWARD L. SMITH
ROGER H. SMITH
CASPER B. UGHETTA
STANLEY C. MORRIS, *Ex Officio*

Report of the Casualty Committee

AS a readily accessible reference for practicing lawyers and Home Office counsel, the Casualty Committee has prepared the following summary of the law in the forty-eight states and the District of Columbia, relating to:

(1) Contributory negligence as a complete defense in negligence cases.
(2) Application of the doctrine of comparative negligence.
(3) The right to compel contribution between joint tortfeasors.

The Committee acknowledges with gratitude the assistance of the following in the preparation of this report.

Sam Rice Baker, Alabama
Theodore G. McKesson, Arizona
A. L. Barber, Arkansas
Thomas B. Pryor, Jr., Arkansas
E. D. Bronson, California
Lowell White, Colorado
William Prickett, Delaware
C. Clyde Atkins, Florida
Ralph F. Lesemann, Illinois
Robert L. Webb, Kansas
George M. Brewster, Kansas
Robert P. Hobson, Kentucky
William A. Porteous, Jr., Louisiana
Palmer R. Nickerson, Maryland
Walter Mansfield, Michigan
Paul J. McGough, Minnesota
Lon Hocker, Missouri
William H. Hoffstot, Jr., Missouri
Robert D. Corette, Montana
William K. Woodburn, Nevada
Jeanne S. Houssels, Nevada
Pearce C. Rodey, New Mexico
John H. Anderson, Jr., North Carolina
Robert Ruark, North Carolina
Clyde L. Young, North Dakota
Byrne A. Bowman, Oklahoma
Robert T. Mantz, Oregon
G. L. B. Rivers, South Carolina
Melvin T. Woods, South Dakota
W. Percy McDonald, Tennessee
J. A. Gooch, Texas
Paul H. Ray, Utah
William Beverley, Virginia
Stanley B. Long, Washington
Kenneth Grubb, Wisconsin
Clarence A. Swainson, Wyoming

ALABAMA

The doctrine of comparative negligence is not recognized and if the plaintiff is guilty of contributory negligence which proximately contributes to the accident, this is a defense. *Godfrey v. Vinson*, 215 Ala. 166, 110 So. 13. Contributory negligence is not a defense to an action for

willful or wanton injury. *Crescent Motor Co. v. Stone,* 208 Ala. 137, 94 So. 78.

There is no contribution between joint tortfeasors. *Vandiver v. Pollak,* 107 Ala. 547, 19 So. 180; *Gobble v. Bradford,* 226 Ala. 517, 147 So. 619. This latter case left open the question of whether or not one who was liable on the doctrine of respondeat superior could recover from a joint tortfeasor who was personally guilty of wrong. If they are wrong-doers to each other, there can be no contribution, but if both are wrong-doers to a third person, and they are not wrong-doers to each other, the court has indicated that there might be contribution. *Ala. Power Co. v. Curry,* 228 Ala. 444, 153 So. 634. See *Brady v. Black Diamond S. S. Co.,* 1941, 45 F. Supp. 338, in which Alabama law is construed and applied so as to require contribution to one not an actual participant in the wrong, nor in pari delicto and who is only constructively or "derivatively" liable.

ARIZONA

Contributory negligence is an absolute bar to recovery but is always a question of fact as provided by the constitution except that in the event the one who pleads contributory negligence is guilty of gross and willful misconduct, the plea of contributory negligence fails. *Alabama Freight Lines v. Phoenix Bakery,* 166 P. 2d 816.

The doctrine of comparative negligence is not recognized.

Each joint tortfeasor is liable for the whole and each is liable for half if both are financially responsible.

The Committee finds no decision in Arizona on the subject of contribution or indemnity between tortfeasors not in pari delicto; but see *Salt River Valley Water Users' Ass'n. v. Cornum,* 1937, 63 P. 2d 639, which recognizes the distinction between active and passive tortfeasors and holds that the negligent acts of several persons must arise from "some community of wrong or fault to give rise to joint liability" and that the alleged negligent acts must correspond in "time" and "character" to give rise to a joint liability.

ARKANSAS

Contributory negligence is negligence of the plaintiff that contributes to the injury, and such negligence will bar plaintiff's recovery. *Taggart v. Scott,* 193 Ark. 930, 104 S. W. 2d 816, 1937. Contributory negligence is an affirmative defense, and burden of proving it, if it does not appear from other evidence, rests upon defendant. *Albritton v. C. M. Ferguson & Son,* 197 Ark. 436, 122 S.W. 2d 620, 1939.

Under Sections 73-916 and 73-1004, Arkansas Statutes, 1947, the comparative negligence rule applies in all negligence suits against railroads provided the negligence of the plaintiff or person killed is of less degree than the negligence of the defendant; this applies to suits by members of the public for injury or damage caused by the running of trains as well as in the case of actions by employees against common carriers.

Right to contribution exists among joint tortfeasors by virtue of statute. Uniform Contribution Among Tortfeasors Act, Arkansas Stats. Ann., Section 34-1001 (with modification of Sections 1, 3 and 7).[1] Arkansas has no decided case involving recovery by a passive tortfeasor against an active tortfeasor.

CALIFORNIA

California is a contributory negligence state. The rule is based on Section 1714 Civil Code, holding: "That everyone is responsible . . . for an injury occasioned to another by his want of ordinary care . . . except so far as the latter has wilfully or by want of ordinary care brought the injury upon himself."

In pleading, contributory negligence is an affirmative defense, and the burden of proving it is on the defendant. In recent decisions, practically every question of negligence is held one of fact for the jury. When proved, contributory negligence of the plaintiff is a complete defense.

The doctrine of comparative negligence has not been adopted in California.

There is no contribution between joint tortfeasors in this state. *Adams v. White Bus Line,* 1921, 184 Cal. 710, 195 P. 389. *Pacific Indemnity Co. v. California Electric Works,* 1938, 29 Cal. App. 2d 260, 84 P. 2d 313. This rule applies to the indemnitor of one joint tortfeasor against the other tortfeasor. *Smith v. Fall River Joint Union*

[1] Following added to Section 3 of Uniform Act: "Nothing in this Act shall be construed to affect the several joint tortfeasors' common law liability to have judgment recovered and payment made from them individually by the injured person for the whole injury."

High School District, 1934, 1 Cal. 2d 331, 34 P. 2d 994.

No appellate court decisions have made an exception to the rule against contribution in the case of a passive tortfeasor, or discussed the point. On the other hand, there is a growing acceptance at the trial court level of the theory that a passive tortfeasor may sue and recover over in full against the active tortfeasor. The proposition has never been squarely presented to the appellate courts in California. However, see *Pacific Indemnity Co. v. California Electric Works*, 1939, 84 P. 2d 313, which recognizes a distinction between active and passive tortfeasors; also see *Spruce v. Wellman*, 1950, 219 P. 2d 472 for proposition that employer against whom judgment has been rendered for the unauthorized act of his employee may recoup its loss from the employee.

COLORADO

Negligence of a plaintiff which is a proximate cause of the injury upon which a negligence action is brought is a bar to recovery in such a case. As well as the general tests of what is negligent conduct, assumption of risk is considered to be a form of contributory negligence. *Boulder Valley Co. v. Jerneberg*, 1948, 118 Colo. 486, 197 P. (2d) 155.

The doctrine of comparative negligence is not followed.

Contributory negligence is an affirmative defense which must be pleaded by a defendant. Rules of Civil Procedure, No. 8C. The burden of proving contributory negligence is on the party pleading it.

As a general rule there is no right of contribution between joint tortfeasors, but a passive wrongdoer may seek indemnity from a tortfeasor whose negligence is proved to have been the "sole, proximate, and primary cause" of the injury. See *Parrish v. D. E. Remer*, 1947, 117 Colo. 256, 187 P. (2d) 597, summarizing Colorado Law contribution of joint tortfeasors. There is no statute on this subject.

CONNECTICUT

Negligence is deemed contributory only when it is a proximate cause of the injury. Its existence or non-existence ordinarily depends on whether the plaintiff acted as a reasonably prudent man. *Montambault v. Waterbury Mildale Tramway Co.*, 98 Conn. 584; 120 A. 145. The defense of contributory negligence is not available where the injury is inflicted under conditions open to the charge of willfulness or wantonness, *Bordonara v. Senk*, 109 Conn. 428; 147 A. 136, or reckless misconduct, *Heslin v. Malone*, 116 Conn. 471; 165 A. 594.

In an action to recover damages for negligently causing the death of a person, or for personal injury or property damage, it is presumed that such person was in the exercise of reasonable care, and if contributory negligence is relied on as a defense, defendant must plead and prove it. (General Statutes of Connecticut, Revision of 1949, Section 8296). Where the plaintiff alleged that his intestate was at all times in the exercise of due care, and the defendant denied this allegation, and did not affirmatively plead contributory negligence, it was held that the plaintiff voluntarily assumed the affirmative on the issue, despite the statute, *Yanez v. De Rosa*, 118 Conn. 471; 172 A. 926. The statute being procedural is applicable even where an accident occurred before its enactment, *Toletti vs. Bidizacki*, 118 Conn. 531; 173 A. 223.

The doctrine of comparative negligence is unknown in this State. Contributory negligence bars a recovery though defendant was guilty of gross negligence, *Rowen v. R. R.*, 59 Conn. 364, 21 A. 1073.

There is no contribution among joint tortfeasors, *Sparrow v. Bromage*, 83 Conn. 27, 74 A. 1070; *Rose v. Heisler*, 118 Conn. 632, 174 A. 66; *Rode v. Adley Express Co.*, 130 Conn. 274, 33 A. (2d) 329. Where negligence of each of two defendants enters immediately and directly into production of an accident neither has a right to contribution, but where one of the defendants is in control of the situation and his negligence alone is the direct, immediate cause of injury and the other defendant does not know of the fault, has no reason to anticipate it and may reasonably rely upon the former not to commit a wrong, the former must bear the burden of damages due to the injury. *Preferred Accident Ins. Co. of N. Y. v. Musante Berman & Steinberg Co.*, 133 Conn. 536, 52 A. (2d) 862.

DELAWARE

Contributory negligence of the plaintiff "evidencing a proximate cause is sufficient to defeat a recovery on his part." *James v. Krause*, 1950, 75 A. (2d) 237.

The doctrine of comparative negligence is not recognized.

The Uniform Contribution Among Joint Tortfeasors Act, 47 Delaware Laws 259 was approved by the Governor on May 27, 1949, and is now in effect with modifications of Section 7.

DISTRICT OF COLUMBIA

In an action for negligence, the defendant is not liable for damages when the plaintiff's fault contributed to the injury. *Francis X. Dant v. District of Columbia*, 1877, 10 D.C. 270. But see *Weber v. Eaton*, 1947, 82 Apps. D.C. 66, 160 F. 2d 577, where assumption of risk doctrine precluded recovery of plaintiff who was injured when riding with defendant who, she knew, had been drinking.

There are no cases in the District of Columbia on comparative negligence except under the Federal Employer's Liability Act.

The right of contribution between joint tortfeasors was established by judicial decision without aid of statute in *George's Radio v. Capital Transit Company*, 1942, 75 App. D.C. 187, 126 F. 2d 219, and reaffirmed in *Knell v. Feltman*, 1949, C.A.-D.C. 174 F. 2d 662. Where one is held liable to a third person for only passive negligence and discharges the obligation in full, he may obtain reimbursement in full, not as contribution but by way of indemnity, against one who by his active negligence primarily caused the harm to such third person. *Washington Gas Light Co. v. District of Columbia*, 161 U.S. 316, 16 S. Ct. 564, 40 L. Ed. 712.

FLORIDA

In Florida, contributory negligence is a complete defense to a tort action. Of course, the plaintiff's negligence must proximately contribute in some manner, even though it may be to the slightest extent, to produce or bring about injury to him. The law leaves the parties, under those circumstances, where it found them and neither has the right to recover from the other. There is no duty on the part of the Court or the jury to determine who was the more negligent. Leading Florida cases on this subject are: *Mendez v. Saffold Bros. Produce Co.*, 121 Fla. 296, 163 So. 573; *Carter v. Florida Power & Light Co.*, 138 Fla. 220, 189 So. 705; *Grieper v. Coburn, et al*, 139 Fla. 293, 190 So. 902. The above rule of contributory negligence does not apply to persons engaged in certain hazardous occupations, namely, railroading, operating street railways, generating and selling electricity, telegraph and telephone business, express business, blasting and dynamiting, operating automobiles for public use, boating when boat is propelled by steam, gas or electricity. (Florida Statutes, 1949, Sec. 769.01). As a result of this Statute and Sec. 769.03 Florida Statutes, 1949, the comparative negligence doctrine applies so that the amount of the plaintiff's recovery is in such proportion of the entire damages sustained as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant. The doctrine of assumption of risk is likewise abrogated by Sec. 769.04, Florida Statutes, 1949, in such cases where the injury or death was attributable to the negligence of the employer, his agent or servant.

There is no contribution between joint tortfeasors in Florida, *Crenshaw Bros. Produce Co. v. Harper*, 142 Fla. 27, 194 So. 353. But indemnity is permitted where the parties are not in pari delicto. *Seaboard Air Line Ry Co. v. American Dist. Electric Protective Co.*, 1932, 106 Fla. 330, 143 So. 316.

GEORGIA

Doctrine of contributory negligence and last clear chance are involved in and vanish as such into the principle of comparative negligence and apportionment of damages. Code Secs. 73-303, 105-2012. Where the negligence of both parties concurs to proximately cause the injury or damage, if the negligence of the plaintiff equals or exceeds that of the defendant, a recovery cannot be had. If the plaintiff fails to exercise ordinary care or, if by the exercise of ordinary care, could have avoided the defendant's negligence, there can be no recovery. If the plaintiff is negligent in a lesser degree than the defendant, the damages shall be diminished in proportion to the amount of negligence attributable to the plaintiff. Special code sections refer to the duty of care owed by a common carrier to the passengers, bailor to bailee, and also workmen's compensation liability. *Smith v. American Oil Co.*, 49 S.E. (2d) 90.

The common law rule denying right of contribution to joint tortfeasors is not in force in Georgia. Code sections 37-303, 105-2012. *Southern R. Co. v. City of Rome*,

176 S.E. 7, 779 Ga. 449. Where the negligence of the parties is of the same character, there can be no recovery. *Central of Georgia Ry. Co., v. Macon Ry. & Light Co.,* 78 S.E. 931, 140 Ga. 309. One guilty of positive, wrongful, creative acts of negligence is liable to one whose negligence results from negative acts or omissions. *Advanced Refrigeration Inc. v. United Motors Service Inc.,* 26 S.E. (2d) 789.

IDAHO

Contributory negligence which will bar recovery is established only when it is shown that at the time of, or before the injury, the person injured was guilty of a failure to exercise ordinary care for his own protection and that such failure was the proximate and contributing cause of the injury. *Maier v. Minidoka County Motor Company,* 105 P. (2d) 1076. The burden to negative contributory negligence does not fall on the plaintiff. Idaho Code 4-816. There is no statutory or judicial recognition of the Comparative Negligence Doctrine.

The Last Clear Chance Doctrine may be applied even where concurrent or contemporaneous negligence by the plaintiff is charged. *Evans v. Davidson,* 77 P. (2d) 661.

Contribution among joint tortfeasors is based upon Section 11-303 of the Code, providing as follows:

> "When upon an execution against several persons more than a due proportion of the judgment is satisfied out of the proceeds of the sale of the property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several, and is upon an obligation of one of them, as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal. In such case the person so paying or contributing is entitled to the benefit of the judgment to enforce contribution or repayment, if, within ten days after his payment, he file with the Clerk of the Court where the judgment was rendered, notice of his payment and claim to contribution or repayment. Upon a filing of such notice the Clerk must make an entry thereof in the margin of the docket."

ILLINOIS

Contributory negligence that will bar plaintiff's recovery must be a proximate cause of the injury. *Schmidt v. Anderson,* 1939, 301 Ill. App. 28, 21 N. E. (2d) 825.

Plaintiff has burden of showing he was not guilty of contributory negligence. *Wesbrock v. Colby, Inc.,* 1942, 315 Ill. App. 494, 43 N.E. (2d) 405.

As a general rule, there is no right of contribution between joint tortfeasors where there is concerted action in the commission of the wrong; where, however, there is no concert of action and the parties are not in pari delicto, the general rule is not applied. *Skala v. Lehon,* 1931, 343 Ill. 602, 175 N. E. 832. The following pertinent quotation is taken from *Gulf, Mobile and Ohio Railroad Co. v. Arthur Dixon Transfer Company,* decided April 6, 1951, 98 N. E. (2d) 783 (Ill.).

"A railroad which is guilty of only passive technical negligence in violating the Federal Employers Liability Act may recover indemnity from one whose active and primary negligence actually caused the injury for which the railroad has been held responsible. Mere motion does not define the distinction between active and passive negligence."

INDIANA

Negligence of a plaintiff which proximately contributes to the injury complained of will defeat recovery. *Pierce v. Clemens,* 113 Ind. App. 65, 46 N.E. (2d) 836, 1943.

There is no presumption that a person was or was not guilty of contributory negligence. *Kelley v. Dickerson,* 213 Ind. 624, 13 N.E. (2d) 535, 1938.

Contributory negligence is a defense and the burden of establishing it rests upon defendant. *Dunbar v. Demaree,* 102 Ind. App. 585, 2 N.E. (2d) 1003, 1936; Burns Ann. Stats., Section 2-1025.

No right of contribution exists that can be enforced as between persons liable for the same tort. *Jackson v. Record,* 211 Ind. 141, 5 N.E. (2d) 897, 1937. A passive tortfeasor may recover the amount he is compelled to pay from the primary and active wrongdoer. *Westfield Gas & Milling Co. v. Noblesville & Hazletown Gravel Road Company,* 1895, 13 Ind. App. 481, 41 N.E. 955.

IOWA

Negligence of a plaintiff which contributes in any "manner or degree" to the cause of injury is a bar to recovery in negligence cases, except in cases where the last clear chance and discovered peril rule applies. *Steele v. Brada,* 1931, 213 Iowa 708, 239 N.W. 538. Contributory negligence is "peculiarly" a question for the jury "save in very exceptional cases." *Falt v. Krug,* 1948, 239 Iowa 766, 32 N.W. (2d) 781. The burden is on the plaintiff to plead and prove his freedom therefrom. By statute the doctrine of comparative negligence applies to actions by employees against railway corporations "connected with the use and operation of any railway on or about which they shall be employed." (Code Sec. 479.124). By rule of the Supreme Court, negligence of a plaintiff may be pleaded and proved by a defendant in "mitigation of damages" in actions by (1) an employee against an employer, and (2) passenger against carrier. (Rules Civil Procedure No. 97).

Generally, there is no right of contribution between joint tortfeasors but a passive and morally innocent wrongdoer may recover over against a primary and active wrong doer. *Horrabin v. Des Moines,* 1924, 198 Iowa 549, 199 N.W. 988. Iowa has no statute as to contribution among joint tortfeasors.

KANSAS

"Contributory negligence is conduct on the part of a plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause, cooperating with the negligence of the defendant, in bringing about the plaintiff's harm. It is conduct which falls short of the standard to which a reasonable man should conform in order to protect himself from harm." *Cruse v. Dole,* 155 Kan. 292, 124 P. 2d 470, Syl. 1. "***contributory negligence is a defense which ordinarily must be pleaded but *** petition is demurrable when it discloses on its face the person in whose behalf recovery is sought was guilty of contributory negligence." *Henderson v. National Mutual Cas. Co.,* 164 Kan. 109, 111, 187 P. (2d) 508.

Kansas has never recognized the doctrine of comparative negligence.

A wrongdoer cannot compel contribution from others who participate in the commission of the wrong. *Rucker v. Allendorph,* 102 Kan. 771, 773, 172 P. 524. Kansas has no statute on the subject of contribution between joint tortfeasors. A passive tortfeasor may recover indemnity from the active and real wrongdoer. *City of Ft. Scott v. Pen Lubric Oil Co.,* 1927, 122 Kan. 369, 252 P. 268.

KENTUCKY

Contributory negligence is a complete defense to every negligence case in Kentucky and the stereotype form instruction is that it must contribute to the occurrence to such an extent that otherwise it would not have occurred. *Smith's Administrator v. Ford Motor Company,* 261 S. W. 245.

KRS 412.030 provides that there may be contribution between wrongdoers where the act was mere negligence and does not involve moral turpitude. This has been held to mean fifty-fifty. *Consolidated Coach Corporation v. Wright,* 22 S.W. (2d) 108. But the statute does not prevent a passive wrongdoer from recovering in full from a primary and active wrongdoer. *Middlesboro Home Telephone Co. v. L. & N. R. Co.,* 1926, 214 Ky. 822, 284 S. W. 104; *Brown Hotel Co. v. Pittsburgh Fuel Co.,* 1949, 311 Ky. 396, 224 S. W. (2d) 165.

LOUISIANA

Contributory negligence either as proximate cause, or one of proximate causes, of accident will generally bar recovery by plaintiff guilty of it, *Iglesias v. Campbell,* 175 So. 145, (La. App., 1937) except where the doctrine of last clear chance or discovered peril applies. *O'Connor v. Chicago,* R.I. & P. Ry., 40 So. (2d) 663.

Burden is on defendant to prove contributory negligence. *Pegg v. Toye Bros. Yellow Cab Co.,* 167 So. 896, (La. App., 1939).

Joint tortfeasors may enforce contribution between or among themselves where they are cast and condemned to pay in one and the same judgment. *Aetna v. DeJean,* 185 La. 1074, 171 So. 450; *Toye Bros. Yellow Cab Co. v. V-8 Cab Co.,* 18 So. (2d) 514, (La. App. 1944), Civ. Code La., Arts. 2104-2324. A passive tortfeasor may recover the entire amount it has been required to pay a third party from the active tortfeasor. *American Employers Ins. Co. v. Gulf States Utilities Co.,* 4 So. (2d) 628 (La. App. 1941).

MAINE

If the plaintiff fails to exercise the degree of care of an ordinarily prudent person under the same circumstances and if his negligence is concurrent with that of the defendant, he cannot recover. *Collins v. Maine Central R. Co.*, 4 A. (2d) 100, 136 Me. 149. Plaintiff has burden of establishing his due care. *Spang v. Cote*, 63 A. (2d) 823. See Revised Statutes, 1944, Chap. 100, Sec. 50, where death or injury causing death at time of trial provides contributory negligence must be pleaded and proved by the defendant.

Maine does not recognize the doctrine of comparative negligence.

As between joint tortfeasors in pari delicto, there is no right of contribution. *Hobbs v. Hurley*, 104 A. 815, 117 Me. 449. Contribution is allowed however as between joint tortfeasors who are not intentional and willful wrongdoers but are wrongdoers only by legal inference or intendment. *Hobbs v. Hurley, supra.*

MARYLAND

Negligence of a plaintiff which is directly contributory to an accident, bars recovery. *Clark Bros. Co. v. United Rys. & Electric Co.*, 1920, 137 Md. 159, 111 A. 829.

The doctrine of comparative negligence is not recognized or applied.

Maryland has adopted the Uniform Contribution Among Joint Tortfeasors Act, which took effect June 1, 1941 (Code Supp. 1947, Art. 50, Sections 21-30, Sections 1 and 7 of Uniform Act altered.[2]

MASSACHUSETTS

Negligence of a plaintiff which contributes to the cause of injury and is not a condition is a bar to recovery in negligence cases, but not a bar to recovery where the defendant is guilty of willful, wanton and reckless misconduct. *Aiken v. Holyoke Street Ry. Co.*, 184 Mass. 269, 68 N.E. 238. Contributory negligence is an affirmative defense to be set up in the answer and proved by the defendant. Gen. Laws (Ter. Ed.), Chap. 231, Sec. 85. By statute, the plaintiff's negligence is not a bar to recovery in an action against a railroad for a grade crossing accident, unless the plaintiff is guilty of "gross or willful negligence or was acting in violation of the law" which contributed to the injury. Gen. Laws (Ter. Ed.) Chap. 160, Sec. 232; in an action against a railroad by a passenger, Gen. Laws, (Ter. Ed.) Chapter 229, Sec. 2A, as amended, *Jones v. Boston & N. St. Ry. Co.*, 205 Mass. 108, 90 N.E. 1142; in Workmen's Compensation cases, Gen. Laws (Ter. Ed.) Chapter 152, Sec. 66.

Massachusetts does not recognize the doctrine of comparative negligence.

Generally, there is no right of contribution between joint tortfeasors, but a technical wrongdoer may recover against a co-wrongdoer, *Gray v. Boston Gas Light Co.*, 114 Mass. 149; recovery is allowed where the parties are not in pari delicto, *Austen v. Hayden*, 138 N.E. 576, 244 Mass. 286.

MICHIGAN

Contributory negligence is a complete defense to a suit predicated on negligence. *Kerns v. Lewis*, 246 Mich. 423; *Shorkey v. Great A. & P. Tea Company*, 259 Mich. 450; *Brown v. Lilli*, 281 Mich. 170. One seeking recovery for negligence must not only show that the defendant was negligent, but that he himself was free from contributory negligence. *Denman v. Johnston*, 80 Mich. 387; *Weber v. Billings*, 184 Mich. 119; *Fish v. Grand Truck Western Railway*, 275 Mich. 718, *Consumers Power Company v. Nash*, 164 Fed. (2d) 657. A defense of contributory negligence is also available to actions by children or their representatives. When contributory negligence is sought to be attributed to a child, the child can only be held to that degree of care which may reasonably be expected from one under the same conditions, of the same age, sex, intelligence and judgment. *Clements v. City of Sault St. Marie*, 289 Mich. 254; *Trudell v. Railway Company*, 126 Mich. 73; *Thornton v. Ionia Free Fair Association*, 229 Mich. 1; *Ackerman v. Petroleum Transport*, 304 Mich. 106. For many years in Michigan, the rule of imputed negligence was recognized and applied. The rule was that the negligence of a driver of a motor vehicle was imputed to a guest passenger which precluded the guest passenger from recovering in any action at law against a negligent third party. The case of *Bricker v. Green*, 313 Mich. 218, decided January 7, 1946, overruled

[2] Subsection 4 of Section 2 of the Uniform Act omitted which provides: "When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares."

and abrogated the rule of imputed negligence. The opinion in *Bricker v. Green, supra*, points out the following exception to the renunciation of the imputed negligence rule which is as follows:

"Thus, if the actor (guest passenger) while riding merely as a guest does not warn the driver of a danger of which he knows and of which he has reason to believe that the driver is unaware, by failing to do so he becomes guilty of contributory negligence which precludes him from recovery against another driver whose negligent driving is also a cause of a collision in which the actor is himself injured."

Section 27.1683 (2) of Michigan Statutes Annotated provides as follows with reference to contribution between joint tortfeasors:

"It shall be lawful for all persons having a claim or cause of action against two or more joint tortfeasors to compound, settle with, and discharge, at any time prior to rendition of a judgment in said action, any and everyone or more of said joint tortfeasors for such sum as such person may deem fit, without impairing the right of such person or persons to demand and collect the balance of said claim or cause of action from the remaining joint tortfeasors, against whom such person, or persons, has such claim or cause of action, and not so released."

Section 27.1683 (3): "An insurer of a person jointly or severally liable with one or more other persons upon a judgment for the same private wrong, which insurer has on behalf of its insured, discharged the common liability by payment, or has paid more than its insured's pro rata share thereof, shall be entitled to assert either in its own name or in the name of its insured any right to contribution which such insured would have acquired by such payment."

Section 27.1683 (4): "Any action for contribution hereunder must be brought in a separate action in chancery within six months after discharge by such party of the common liability or payment of more than his pro rata share."

MINNESOTA

Minnesota does not follow the doctrine of comparative negligence. As a general rule, a plaintiff's negligence will bar recovery if it proximately contributes to the result. The defendant has the burden of proving such negligence. Contributory negligence is not a defense where the defendant has violated a statute enacted to protect a class of persons from their inability to exercise self-protective care. *Dart v. Pure Oil Co.*, 223 Minn. 526, 27 N. W. (2d) 555.

Contribution is available between joint tortfeasors unless the person seeking contribution was guilty of an intentional wrong or conscious illegal act. Establishment of the common liability by judgment in favor of the insured party is not a condition precedent to recovery of contribution by one wrongdoer who has made a fair and provident settlement of the claim.

In Minnesota as a general proposition, contribution and indemnity are treated by the courts as being governed by similar principles. *Duluth, Missabe & N. Ry. Co. v. McCarthy*, 183 Minn. 414, 236 N.W. 766.

Where two joint tortfeasors are both liable to the person injured, but are not in pari delicto as to each other, as where the injury results from a violation by one of a duty owed to the other, indemnity may be recovered from the one primarily liable. *Fidelity & Cas. Co. v. N.W. Telephone Exchange Co.*, 140 Minn. 229, 167 N.W. 800. Likewise, a municipality which has settled a claim for injuries sustained by reason of a defective sidewalk has a right to be indemnified by the person whose active wrongdoing caused the injury, *City of Wabasha v. Southworth*, 54 Minn. 79, 55 N.W. 818; and a party whose liability for injuries caused by defective premises is predicated upon ownership of the premises, is entitled to indemnity from the person to whose act or negligence the injury is directly chargeable. See *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121, 16 N.W. 698.

MISSISSIPPI

The comparative negligence statute, section 1454, Mississippi Code of 1942, provides:

"In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable

to the person having control over the property."

There is no right of contribution between joint tortfeasors. However, where a party is constructively liable for the negligence of another, the liability is joint and several but they are not joint tortfeasors and the one constructively liable may in that case recover from the active tortfeasor. *Granquist v. Crystal Springs Lumber Co.*, 190 Miss. 572, 1 So. (2d) 216.

MISSOURI

Contributory negligence is available in defense of any common law tort action based upon negligence, except in those cases where the humanitarian doctrine is applied (in which cases contributory negligence is not a defense.) This is case law. See, for example, *Dilallo v. Lynch*, 340 Mo. 82, 101 S.W. 2d 7.

Under Missouri law, any right of contribution arises only after judgment by virtue of a statute. (R.S. Mo. 1939, Sec. 3658) which provides as follows:

"Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on a contract."

The statute, first enacted in 1855, has been in its present form since 1915. This statute has not been construed to require 50-50 contribution between joint tortfeasors. It has been held, that in bringing suit for contribution, the suing joint tortfeasor concedes that he is in pari delicto with the other joint tortfeasor, so that he can only recover one-half of the judgment obtained against him and the other defendant. But a defendant, against whom suit is brought for contribution may escape liability by showing his passive negligence against the actively negligent plaintiff. In an action for contribution under the statute a prior judgment against joint tortfeasors is sufficient to constitute prima facie evidence in a subsequent action over for contribution. The distinction between an implied contract for indemnity or full reimbursement and contribution is preserved. *Missouri District Telegraph Co. v. Southwestern Bell Telephone Co.*, 1935, 338 Mo. 692, 93 S.W. 2d 19. See also *Kinloch Telephone Co. v. City of St. Louis*, 1916, 268 Mo. 485, 188 S.W. 182.

MONTANA

Contributory negligence is a complete bar to recovery.

"Every person is bound to an absolute duty to exercise his intelligence to discover and avoid dangers that may threaten him. When, therefore, a plaintiff asserts the right of recovery on the ground of culpable negligence of the defendant, he is bound to show that he exercised his intelligence to discover and avoid the danger, which he alleges was brought about by the negligence of the defendant." 107 Mont. 394, 86 P. 2d 12, *Incret v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company.*

In this connection the Montana Court has defined contributory negligence as follows:

"Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff amounting to a want of ordinary care as, concurring or cooperating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of." *Pilgeram v. Hass, et al.*, 118 Mont. 431, 167 P. 2d 339, 1946.

The doctrine or theory of comparative negligence is not recognized in Montana. *Hughey v. Fergus County*, 98 Mont. 98, 37 P. 2d 1035; *Lake v. Emigh*, 121 Mont. 87, 190 P. 2d 550.

Montana has no statute applicable to the question of contribution among joint tortfeasors and as yet no cases have been decided on the point. Volume 6, Montana Law Review at page 42. Montana has no decision on the subject of the right of a passive tortfeasor to recover in full from an active tortfeasor.

NEBRASKA

The comparative negligence rule (statutory) was adopted in Nebraska in 1913 with the passage of the following act:

"In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plain-

tiff; and all questions of negligence and contributory negligence shall be for the jury." (Sec. 25-1151 R.S. Neb. 1943)

The plaintiff is not required to plead his freedom from negligence.

The burden is on the defendant to plead and prove the negligence of the plaintiff. *Meyer v. Platte Valley Construction Co.,* 25 N.W. 2d 412, 147 Neb. 860.

Contributory negligence of the plaintiff when proved is for the jury under the comparative negligence statute. *Wortman v. Zimmerman,* 230 N.W. 588, 119 Neb. 682.

Where the evidence shows beyond a reasonable doubt that plaintiff's negligence is more than slight as compared with the defendant's negligence, and such negligence of the plaintiff is shown to be a proximate cause, it is proper for the trial court to direct a verdict for the defendant. *Whittaker v. Ranifin,* 291 N.W. 723, 138 Neb. 41; *Meyer v. Platte Valley Construction Co., supra.*

All questions of negligence are for the jury. *Lewis v. Rapid Transit Lines,* 278 N.W. 502, 134 Neb. 311.

Even though plaintiff is guilty of contributory negligence, this shall not be a bar to his recovery where his negligence is slight and the negligence of the defendant is gross in comparison therewith, but the plaintiff's negligence shall be considered by the jury in mitigation of damages.

There is no right of contribution, statutory or otherwise, in Nebraska, between joint tortfeasors. *Johnson v. Torpy,* 53 N.W. 575, 35 Neb. 604. There is no decision specifically upon the subject of recovery over by a passive tortfeasor against an active tortfeasor.

NEVADA

Plaintiff's negligence will not be a bar to a recovery if such negligence was not a proximate cause of the injury. If his negligence is so remote that he would have suffered injuries without it, then it was not contributory in the sense of the law. But, in order to bar recovery by plaintiff, it is not necessary that his negligence shall have been the sole proximate cause. *Cox v. Los Angeles & Salt Lake Railroad Co.,* 56 Nev. 472, 56 P. 2d 149.

The defendant must establish the plea of contributory negligence by a preponderance of the evidence. *Hilton v. Hymens,* 57 Nev. 391, 65 P. 2d 679.

Contributory negligence is usually a question of fact, and becomes a question of law only when the evidence will support no other legitimate inference. *Carter v. City of Fallon,* 54 Nev. 195, 11 P. 2d 817.

Nevada Compiled Laws, 1929, Section 9198, provides that, in actions against a common carrier or mine or mill owner for damages for injuries to an employee, the employees' contributory negligence shall not bar a recovery, where it was slight and the employer's negligence was gross in comparison. Thus the rule of relative or comparative negligence has, by statutory enactment, superseded the common law rule of contributory negligence in these cases.

A contract of insurance or indemnity entered into on behalf of an employee, or accepted by him, will hot bar recovery by an injured employee, but the defendant may set off any sum it has contributed toward any such insurance, relief benefit or indemnity, that may have been paid to the person entitled thereto. NCL 1929, Section 9199.

Nevada has no statute as to contribution by joint tortfeasors, and we are unable to find any local law regarding the subject. In such cases, the Nevada courts give considerable weight to California decisions in point. The Supreme Court has never passed upon the question of whether a passive tortfeasor may recover in full against an active tortfeasor.

NEW HAMPSHIRE

In an action for negligence, contributory negligence is a complete defense. In an action for intentional injuries it is not. *Bachman v. Trav. Ins. Co.,* 78 N. H. 100; 97 A. 223.

The burden of proof of contributory negligence is on defendant in all actions on the case for personal injury or damage to personal property. (384 Revised Laws of 1942, Section 13.)

The doctrine of comparative negligence is unknown in this state.

In general there is no contribution among joint tortfeasors, but a plaintiff who, by reason of his and the defendant's negligence, has been compelled to pay damages to another may recover indemnity although but for his negligence the injury would not have happened, if at the time it occurred he could not, and the defendant could, have prevented it by ordinary care,

Nashua Iron & Steel Co. v. Railroad, 62 N. H. 159.

The release of a statutory liability to make partial compensation for an injury does not operate as a full discharge of others who may be liable for the same wrong, *Stacey v. Hoyt Shoe Co.,* 83 N. H. 281; 141 A. 467. But this rule is inapplicable once the subject matter of the settlement is found to include the claim against the other wrongdoers, *Mullen v. Merchants Nat'l. Bank,* 88 N. H. 90; 184 A. 565.

NEW JERSEY

A plaintiff cannot recover for injuries he sustained in an accident where, but for his own lack of due care, the mishap would not have occurred. Contributory negligence its an affirmative defense which the defendant must plead or it must be otherwise drawn in issue by the pleadings in the action. The burden of proving that the plaintiff was contributorily negligent is also upon the defendant.

The comparative negligence of the plaintiff and the defendant is not to be taken into consideration in assessing damages in a negligence action. *Juliana v. Abeles,* 114 N.J.L. 510; 117 A. 666.

In general, one of two joint tortfeasors cannot maintain an action against the other for indemnification or contribution; however, this rule does not apply where one does the negligent act or creates the nuisance and the other does not join therein but is nevertheless exposed to liability thereby, since in such cases, the parties are not in "pari delicto" as to each other. *Popkin Bros. v. Volk's Tire Co.,* 20 N. J. Misc. 1, 23 A. 2d 162.

NEW MEXICO

Contributory negligence is a bar to an action except that malice, reckless disregard of consequences or circumstances of aggravation which attend the commission of the tort may warrant punitive damages and deny to the wrong doer the defense of contributory negligence unless the plaintiff acts in reckless disregard of his own safety. *Gray v. Esslinger,* 1942, 46 N. M. 421, 130 P. 2d 24 and 46 N. M. 492, 131 P. 2d 981.

The doctrine of comparative negligence is not recognized. (See discussion *Gray v. Esslinger, supra.*)

There is contribution under the Uniform Contribution Among Joint Tortfeasors Act (New Mexico Statutes 1941 annotated, Sec. 21-110) and this includes contribution between the employer and the third person whose negligence is also responsible for the employee's injury where the employee brings suit for Workmen's Compensation. (Section 7 of Uniform Act omitted)

NEW YORK

Contributory negligence of the plaintiff in a negligence action is an absolute bar to his recovery. The burden of pleading and proving freedom from contributory negligence rests with the plaintiff. However, in actions for wrongful death, contributory negligence of the deceased must be both pleaded and proved by the defendant. (Decedent Estate Law—Section 131). There is no doctrine of comparative negligence in existence under the New York Statutes. However, in actions commenced under the Federal Employers' Liability Act and under the Jones Act, the theory of comparative negligence will be applied by Courts of New York.

Pursuant to the statutory law of New York, the right to contribution among joint tortfeasors is permitted upon a recovery of a joint judgment against tortfeasors and upon payment of more than the pro rata share by one of said tortfeasors seeking contribution. (Civil Practice Act, Section 211 A; *Fox v. Western,* 257 N.Y. 305).

Section 211 A of the Civil Practice Act benefits a defendant by limiting his liability to his pro rata share with other defendants. The right to contribution is not affected by the fact that payment has been made by an insurer of the party seeking contribution and that the contribution would enure to the benefit of the insurer. (*Wold v. Grazalsky,* 277 N.Y. 364, 14 N.E. (2d) 437.)

A defendant who is a passive tortfeasor may cross-plead against another defendant in the action and seek reimbursement for all or part of a claim asserted against him (Section 264, C.P.A.). A defendant in an action may implead a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him (Section 193-a C.P.A.). No impleader or cross-pleading is permitted by a joint tortfeasor or an active tortfeasor (*Cloud v. Martin,* 273 A.D. 768; *Hughes v. DeSimone,* First Department, Appellate Division, New York Law Journal, November 6, 1950). The passive breach of an obliga-

tion imposed by the Labor Law may have the effect of active negligence (*Semanchuck v. Fifth Avenue,* 290 N.Y. 419).

NORTH CAROLINA

A recovery is completely barred by negligency of a plaintiff which concurs with defendant's negligence and is a proximate cause of plaintiff's own injuries. *Davis v. Jeffreys,* 197 N.C. 712, 150 S.E. 488, 1929; *Dawson v. Transportation Company,* 230 N.C. 36, 51 S.E. 2d 921, 1949.

The doctrine of comparative negligence is not recognized or applied in North Carolina except in cases arising under N. C. General Statutes (1943), Section 60-67 which involves actions by employees against common carriers by railroad. *Cashatt v. Asheville Seed Company,* 202 N. C. 383, 162 S.E. 893, 1932.

Contribution among joint tortfeasors is specifically provided for in N. C. General Statutes (1943), Section 1-240.

Contribution may arise and be enforced under the statute in the following situations:

(1) Two or more joint tortfeasors may be joined initially by a plaintiff.

(2) At any time before judgment an original defendant may join an additional defendant as a joint tortfeasor by filing a cross action against the additional defendant. *Mangum v. Southern Railway Co.,* 210 N. C. 134, 185 S.E. 644, 1936; *Wilson v. Massagee,* 224 N.C. 705, 32 S.E. 2d 534, 1944.

(3) After judgment has been rendered against one tortfeasor he may enforce contribution from other joint tortfeasors by instituting a separate action therefor. *Charlotte v. Cole,* 223 N. C. 106, 25 S.E. 2d 407, 1943.

The statute does not make any distinction between "active" and "passive" tortfeasors but merely sets forth the methods by which contribution may be enforced by one of several tortfeasors against the other tortfeasors, and by contribution is meant that each tortfeasor shall pay a proportionate part of the judgment.

The definition of joint tortfeasors is found in *Bost v. Metcalfe,* 219 N. C. 607, at page 611, where the court said: "To be joint tortfeasors the parties must either act together in committing the wrong, or their acts, if independent of each other, must unite in causing a single injury."

It seems then that if this definition is met the parties are joint tortfeasors and come within the provisions of the statute as to contribution and the degree of negligence of each tortfeasor makes no difference; that is, active negligence is no worse than passive negligence if, in fact, the two concur in causing an injury. If parties are tortfeasors jointly, then only contribution can be exacted and one who is passively a tortfeasor cannot recover over in full from one who was actively a tortfeasor.

However, if a relationship is established whereby the liability of one is primary and that of another is secondary, even though the two may be joined in one action, he who is only secondarily liable is entitled to have the person primarily liable answer in full. This can be done under N. C. General Statutes (1943), Section 1-222 which states, "1. Judgment may be given . . . for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves." *Bowman v. Greensboro,* 190 N. C. 611; *Gregg v. Wilmington,* 155 N. C. 18. Similarly, although a master and servant generally do not come within the definition of joint tortfeasors it is customary to join the master and the servant in an action arising out of the servant's negligence. The servant may be liable for his active negligence whereas the master is liable only upon the doctrine of respondeat superior. The master becomes secondarily liable and may recover over in full against the servant, either in the same action or in a separate action.

The right to contribution between tortfeasors exists even though the cause of action in favor of the plaintiff against one of the tortfeasors has been barred by lapse of time. *Godfrey v. Power Co.,* 223 N. C. 647, 27 S.E. 2d 736, 1943.

An insurer of one joint tortfeasor paying the judgment recovered against both joint tortfeasors is not entitled to equitable subrogation as against the insurer of the other tortfeasor, there being no relation between the tortfeasors outside the provision of the statute upon which the doctrine of equitable subrogation can be based, and the insurers of the tortfeasors not coming within the provision of the statute in regard to contribution. *Lumbermens Mutual Casualty Company, C. M. Allred and Henry E. Fisher, Trustee for C. M. Allred and Lumbermens Mutual Casualty Company v. United States Fidelity and Guaranty Company,* 1936, 188 S.E. 634, 211 N. C. 13.

NORTH DAKOTA

Contributory negligence bars recovery in negligence cases (9-106, Revised Code of 1943) except that the defense of contributory negligence can be used to mitigate damages in actions by an employee against a railroad (49-1603, Revised Code of 1943) unless the railroad has violated a statute designed to protect the employee (Id.).

Apart from the above exception, the doctrine of comparative negligence is not recognized.

There is no provision by either statute or decision for contribution between joint tortfeasors. The Uniform Contribution Among Joint Tortfeasors Act was introduced and passed by the House of the 1951 Assembly but was indefinitely postponed in the Senate. No statute or decision covers the question of recovery by a passive from an active tortfeasor.

OHIO

If the negligence of a plaintiff proximately contributes to his injury he cannot recover from a negligent defendant. *Patton v. Pennsylvania R. Co.,* 136 Ohio St. 159, 24 N.E. 2d 597, 1940.

The burden is on the defendant to prove contributory negligence. *Valencie v. Akron & B. B. R. Co.,* 133 Ohio St. 287, 13 N.E. 2d 240, 1938.

There can be no contribution among joint tortfeasors guilty of concurrent negligence. However, where one perpetrates a tort and another by reason of his relationship with the active wrong doer is liable, a case of primary and secondary liability arises. The party secondarily liable or his insurer may recover over from the party primarily liable. *Globe Indemnity Co. v. Schmitt,* 1944, 142 Ohio St. 595, 53 N.E. 2d 790; *Albers v. Great Central Transport Corp.,* 1945, 60 N.E. 2d 669.

OKLAHOMA

Contributory negligence: 76 Okla. St. Anno. Sec. 5: "Everyone is responsible, not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, wilfully or by want of ordinary care, brought the injury upon himself."

"Contributory negligence" is such an act or omission on the part of the person injured amounting to an ordinary want of care as, concurring or co-operating with the negligent act of the wrongdoer, is the proximate cause of the injury complained of. *Chickasha Cotton Oil Co. v. Brown,* 39 Okla. 245, 134 P. 850. One may recover although his negligence exposed him to injury, if the injury was caused by the other's lack of care after becoming aware of the danger. *Thorp v. St. Louis & S. F. R. Co.,* 73 Okla. 123, 175 P. 240. Or, if defendant with ordinary care could have known that plaintiff was about to put himself in the dangerous position where he was injured. *Kinney v. St. Louis & S. F. R. Co.,* 38 Okla. 426, 133 P. 180. Or, if defendant might by the exercise of reasonable care have avoided the consequences of the plaintiff's negligence. *Atchison, T. S. F. Ry. Co. v. Baker,* 21 Okla. 51, 95 P. 433.

Art. XXIII, Sec. 6, Oklahoma Constitution: "The defense of contributory negligence or assumption of risk, shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury."

Contribution between joint tortfeasors: There is no statute on this subject.

Where a judgment for damages is rendered against joint tortfeasors, contribution will not be enforced in favor of one of the defendants who pays the whole judgment, but this rule does not apply to a judgment for court costs. *Fakes v. Price,* 18 Okla 413, 89 P. 1123. *Turner v. Kirkwood,* 49 F. 2d 590, cert. den. 284 U.S. 635.

The exception permitting contribution or indemnity in favor of a passive wrongdoer from the active wrongdoer was recognized in *Cain v. Quannah Light & Ice Co.,* 1928, 267 P. 641, but was held inapplicable to the facts. See also *Turner v. Kirkwood,* supra.

OREGON

Contributory negligence is an affirmative defense which must be pleaded and proved by the defendant. Where plaintiff's evidence shows, as a matter of law, that plaintiff was contributorily negligent, plaintiff cannot recover even though contributory negligence not pleaded. *Flatman v. Lulay Bros. Lumber Co.,* 154 P. 2d 535, 175 Ore. 495. Under the Employers' Liability Act, contributory negligence is not a defense but may be pleaded and proved in mitigation of damages. Section 102-1606, Oregon Compiled Laws Annotated. See *Greenhaw v. Pacific-Atlantic Steamship Co.,* 1950, 51 Ore. Adv. Sh. 283.

There is no doctrine of comparative negligence and any contributory negligence on the part of the plaintiff serves as a complete bar to his recovery.

There is no right to contribution between joint tortfeasors in the absence of statute. *Fidelity & Casualty Co. of New York v. Chapman,* 120 P. 2d 223, 167 Ore. 661. However, contribution allowed in favor of passive tortfeasor not in pari delicto, *City of Astoria v. Astoria & C. R. R. Co.,* 1913, 67 Ore. 538, 136 P. 645. But see *Fidelity & Cas. Co. of N. Y. v. Chapman, supra,* and statute on the subject of contribution between joint tortfeasors.

PENNSYLVANIA

Negligence of a plaintiff which contributes in any "manner or degree" to the cause of injury is a bar to recovery in negligence cases. The burden is on the defendant to prove contributory negligence but the plaintiff must present a case free of contributory negligence and if contributory negligence develops in the plaintiff's case it is a bar to recovery. The question of whether contributory negligence exists is a matter of law for the court in the first instance and the court may decide the question as a matter of law if the contributory negligence is such that reasonable minds could not conclude otherwise. If there is a doubt as to contributory negligence it becomes a question of fact for the jury.

There is no comparative negligence in Pennsylvania. Where reckless or wanton misconduct is proved on the part of the defendant contributory negligence is not a defense. *Kasanovich v. George,* 348 Pa. 199.

By satute contribution is enforceable among those who are jointly or severally liable for a tort where, as between them, such liabilities are either all primary or all secondary. Act of 1939, June 24, P. L. 1075; 12 Purdon's Statutes, Section 2081. See also *Goldman v. Mitchell-Fletcher,* 292 Pa. 354, 141 A. 231. Neither the cited statute nor the Goldman decision disturbed the right of a defendant only secondarily liable for a tort to recover in full from the one primarily liable the amount of damages the one secondarily liable was compelled to pay. *Fisher v. Diehl,* 1945, 40 A. 2d 912.

RHODE ISLAND

To constitute contributory negligence barring recovery, there must be proximate connection between negligence and injury. The care required is ordinary care, *Peycke v. UER Co.,* 49 R. I. 257; 142 A. 232. The burden is on the plaintiff to plead and prove his freedom therefrom.

The doctrine of comparative negligence is unknown in this state.

In this state the doctrine of degrees of negligence has never been adopted, *Leonard v. Bartle,* 48 R. I. 101; 135 A. 853.

Rhode Island was the first state to adopt the Uniform Contribution Among Tortfeasors Act. (Chapter 940, Public Laws 1940; Section 7 of Uniform Act omitted;)

A joint tortfeasor is entitled to contribution when he has discharged the common liability or has paid more than his *pro rata* share. A recovery of judgment by an injured person against one joint tortfeasor does not discharge the others. A release of one, before or after judgment, does not discharge the other unless the release so provides, but reduces the claim. The limitation on suit for contribution is 2 years from the date of injury. (Chapter 1635, Public Laws of 1945.) Under the Act, defendant is not discharged by satisfaction of judgment against the joint tortfeasor, but such judgment must be applied in reduction of judgments that may be rendered against defendant, *Hackett v. Hyson,* 72 R. E. 132; 48 A. 2d 353. It is the consensus of opinion that covenants not to sue have the same effect under the Act as releases.

SOUTH CAROLINA

Contributory negligence of the plaintiff bars recovery in a negligence action. Contributory negligence is not a defense to an action for willful misconduct; however, "contributory willfulness" is recognized as a complete defense to an action based upon willful misconduct. *Spillers v. Griffin,* 1918, 109 S. C. 78, 95 S.E. 133.

Ordinarily, the doctrine of comparative negligence is not recognized in this state. *McLeon v. Atlantic Coast Line R. Co.,* 81 S. C. 100, 61 S.E. 900, 1071, 18 L.R.A. N.S. 763, 128 Am. St. Rep. 892. The general rule is subject to the exception that the doctrine of comparative negligence exists by statute in this state in the matter of railroad employer's liability. Code, Section 8367; *Bedford v. Armory Wholesale Grocery Co.,* 195 S. C. 150, 10 S.E. 2d 330. *Boyleston v. Southern R. Co.,* 1947, 44 S.E. 2d 537, 211 S. C. 232, 173 A.L.R. 788.

One of two joint wrongdoers can have no contribution from the other. *Brown v. Southern Ry. Co. et al.,* 1918, 96 S.E. 701, 111 S. C. 140. No South Carolina decision differentiates between active and passive tortfeasors.

SOUTH DAKOTA

In 1941 the Legislature passed a comparative negligence law patterned after that of Nebraska (Chapter 160 Laws 1941). The court has held that this statute renders the rule of contributory negligence inapplicable if the plaintiff's contributory negligence is small in quantity in cases where it also appears that the disparity between the quantum of defendant's negligence and the plaintiff's negligence is extreme. The contributory negligence of plaintiff must be no more than slight and the negligence of the defendant must be no less than gross or great in comparison with the slight or small contributory negligence of the plaintiff. Where the plaintiff was guilty of more than slight negligence, his recovery is barred. *Friese v. Gulbrandson,* 1943, 69 S. D. 179, 8 N.W. 2d 438.

Contribution is allowable between joint tortfeasors by virtue of the Uniform Contribution Among Joint Tortfeasors Act (Chapter 167, Laws 1945) which was adopted effective February 24, 1945.

TENNESSEE

Contributory negligence which proximately contributes to the infliction of the injury is a bar to an action, because a person cannot be permitted to rush upon an apparent danger and then, because of an injury, saddle the other party with the pecuniary consequences of an injury which his own want of care brought upon him. *Nashville R. Co. v. Norman,* 108 Tenn. 324, 67 S.W. 479.

There can be no contribution between joint wrongdoers where they, by concert of action, have been guilty of a willful tort, an immoral act, or were consciously violating the law. Joint tortfeasors guilty of mere passive or negative negligence only may recover contribution where other joint tortfeasor has contributed more proximately by positive or active negligence to the injury. *Davis, et al. v. Broad Street Garage, et al.,* 232 S.W. 2d 355.

TEXAS

In Texas contributory negligence on the part of a plaintiff is a complete bar to recovery. It is always available as a defense except where the act forming the basis of plaintiff's suit was deliberate and intentional. It may be negatived by application of the doctrine of discovered peril.

Article 2212 Revised Civil Statutes of Texas provides for contribution between joint tortfeasors where the right does not exist at common law. Texas, therefore, allows a contribution under all situations where it is allowed by the common law and also under the statute. *Wheeler v. Glazer,* 1941, 153 S.W. 2d 449. Article 2212 provides: "Any person against whom, with one or more others, a judgment is rendered in any suit on an action arising out of, or based on tort, except in causes wherein the right of contribution or of indemnity or of recovery over, by and between the defendants is given by statute or exists under the common law, shall, upon payment of said judgment, have a right of action against his co-defendant or co-defendants and may recover from each a sum equal to the proportion of all of the defendants named in said judgment rendered to the whole amount of said judgment. If any of said persons co-defendant be insolvent, then recovery may be had in proportion as such defendant or defendants are not insolvent; and the right of recovery over against such insolvent defendant or defendants in judgment shall exist in favor of each defendant in judgment in proportion as he has been caused to pay by reason of such insolvency."

Indemnity may be had by a joint tortfeasor where he was passively negligent and the joint tortfeasor was guilty of active negligence. More recently the rule has been to allow indemnity to one who was guilty of negligence only to the plaintiff as against one who has negligently breached a duty owed both to the original plaintiff and to the joint tortfeasor. See *Wheeler v. Glazer,* 1941, 137 Tex. 341; 153 S.W. 2d 449 and *Austin Road Co. v. Pipe,* Sup. Ct. 1949, 216 S.W. 2d 563.

UTAH

Contributory negligence is a bar to recovery in negligence cases.

The doctrine of comparative negligence is not recognized.

There is no right of contribution between joint tortfeasors but the right of recovery over by a passive tortfeasor against an active or primary wrongdoer is recognized.

VERMONT

Plaintiff's negligence to bar his recovery must have been proximate and not a remote cause of the accident. *Skoll v. Cushman,* 13 A. (2d) 180. Plaintiff has the burden of proving that he was free from contributory negligence. *Long v. Leonard,* 32 A. (2d) 679.

In the absence of legislative authority,

the doctrine of comparative negligence will not be applied. *Hazen v. Rutland R. Co.*, 94 A. 296, 89 Vt. 94. There has been no statutory acceptance of the doctrine.

Generally where two or more tortfeasors are in pari delicto there can be no right of contribution among them. *Atkins v. Johnson*, 43 Vt. 78. A technical wrongdoer, or one who acts in good faith and without knowledge, actual or constructive, of his tortious conduct, may recover from another co-wrongdoer. *Spalding v. Oakes*, 42 Vt. 343.

VIRGINIA

Contributory negligence which proximately causes or efficiently contributes to plaintiff's injury, is a bar to his recovery.

The doctrine of comparative negligence is not recognized or applied.

Section 8-627, Code of Virginia 1950, provides:

"Contribution among wrongdoers may be enforced when the wrong is a mere act of negligence and involves no moral turpitude.

The statutory right of contribution applies only where the person injured has a right of action against two or more persons for the same indivisible injury. Though the concurring negligence of two persons may have resulted in an indivisible injury to a third person, if the third person has a cause of action against only one of them, that one cannot enforce contribution from the other. An action for contribution can be maintained by the *tortfeasor* against whom judgment is obtained, if he alone is sued. If one *tortfeasor* compromises a claim, and the other alleged *tortfeasor* refuses to contribute, the former can still maintain his action for contribution against the latter by proving the following elements to support a recovery:

(a) That he was negligent *himself* (otherwise he would be a volunteer and not entitled to contribution);

(b) That the other *tortfeasor* was negligent;

(c) That the negligence of each combined to cause an indivisible injury to the third person;

(d) That the payment in compromise was a reasonable one when considered in the light of the injuries sustained.

It has been successfully assumed, without attack, that contribution means 50-50 or nothing, rather than some other percentage to be fixed by a jury.

One who, without liability on his part, becomes liable to a third person by reason of the doctrine of respondeat superior, is subrogated to the rights of the injured person to recover from the servant, the one primarily liable. *Maryland Casualty Company v. Aetna Casualty & Surety Co.*, 1950, 60 S.E. 2d 876.

WASHINGTON

Contributory negligence is an affirmative defense, the burden of proving which is upon the defendant. *Hadley v. Simpson*, 115 P. 2d 675; 9 Wash. 2d 591.

The doctrine of comparative negligence has not been adopted, and any contributory negligence on the part of the plaintiff serves as a bar to his recovery.

The right of contribution between joint tortfeasors does not exist in the absence of statute. *City of Seattle v. Shorrock*, 170 P. 590, 100 Wash. 234. No statute has been adopted in this matter. Where the defendants are not in pari delicto, the active and primary wrongdoer must indemnify the passive tortfeasor, for in such a situation the parties are not joint tortfeasors. *City of Cle Elum v. Yeaman*, 1927, 145 Wash. 157, 259 P. 35. However, a passive tortfeasor may recover in full against an active tortfeasor. *Alaska Steamship Company v. Pacific Coast Gypsum Company*, 1912, 71 Wash. 359, 128 P. 654.

WEST VIRGINIA

In a negligence action in the State of West Virginia, when a plaintill is negligent and his negligence concurs and cooperates with that of the defendant as a proximate cause of the injury complained of, he cannot recover. *Costo v. Charleston Transit*, 120 W. Va. 676. A workable test of contributory negligence under the Decisional Law of West Virginia seems to be that if the plaintiff's negligence were such that without it, the negligence of the defendant would have brought about the injuries just the same, the plaintiff's negligence does not bar recovery. *Willhide v. Biggs*, 118 W. Va. 160. It is the settled law of West Virginia that in an action for negligence, the burden of pleading and proving contributory negligence rests upon the defendant. *Riley v. Railway Co.*, 27 W. Va. 145.

Under the Decisional Law of West Virginia, the theory of comparative negligence is not applicable.

Pursuant to Section 5482 of the West

Virginia Code of 1943, contribution may be had among joint tortfeasors as to a joint judgment which already has been obtained against them. Sec. 5482 provides: "Where a judgment is rendered in an action ex delicto against several persons jointly and satisfaction of such judgment is made by any one or more of such persons, the others shall be liable to contribution to the same extent as if the judgment were upon an action ex contractu." The statute does not make any distinction between active and passive torts nor between torts *malum in se* and *malum prohibitum*.

The United States Court of Appeals for the Fourth Circuit, in the case of *B & O. vs. Saunders, et al.*, 159 P. (2d) 481 (CCA 4th 1947), undertaking to expound upon the rule of decision in West Virginia, has held that there is no right to contribution among co-tortfeasors in the absence of a joint judgment. The West Virginia case of *Hutcherson v. Slate*, 105 W. Va. 184 (1928), would seem to hold to the contrary. Whether the right to contribution where the act is a merely *malum prohibitum* exists in the absence of a joint judgment in West Virginia is highly uncertain in view of the decision of the United States Court of Appeals.

WISCONSIN

The Wisconsin comparative negligence law (Section 331.045) provides:

"Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to the person or property, if such negligence is not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering."

As this is applied, if a plaintiff is found guilty of 40 per cent casual negligence and the defendant 60 per cent, the plaintiff recovers 60 per cent of his damages. If the plaintiff is guilty of 49 per cent, defendant 51 per cent, plaintiff recovers 51 per cent of his damages. If plaintiff is guilty of 50 per cent or more, he makes no recovery.

The first case in which the Court adopted the rule of contribution between joint tortfeasors was that of *Ellis v. C. & N.W. R.R. Co.*, 167 Wis. 392, 167 N.W. 1048, decided on May 21, 1916. It has been continuously adhered to since. There is some question as to a situation where one defendant is guilty of willful or malicious injury. Our Court has indicated that in such a situation the one guilty of willful or malicious injury (gross negligence under our decisions) would not be entitled to contribution from the one guilty of ordinary negligence.

WYOMING

Generally, the doctrine of contributory negligence applies as an absolute bar, but in actions against railroads based on injuries to employees, the negligence of an employee only serves to reduce possible damages. If the injury to such employee resulted from railroad's violation of a statute designed to protect the employee, then it cannot be held that the latter was contributorially negligent. *Wyo. Comp. Stat.* 1945, Sec. 65-502.

The doctrine of comparative negligence is not recognized by statute or judicial decision.

Contribution is not allowable between joint tortfeasors, but a passive tortfeasor may recover over in full against an active tortfeasor guilty of primary negligence. *Miller v. New York Oil Co.*, 1926, 234 P. 118.

Respectfully submitted,

Ahlers, Paul F., Chairman
Donovan, James B., Vice Chairman
Reynolds, Hugh E., Vice Chairman
Allen, James P., Jr.
Anderson, Dorman C.
Andrews, John D.
Borgelt, E. H.
Boss, Henry M.
Chilcote, Sanford Marshall
Cooper, George J.
Cull, Frank X.
Dimond, Herbert F.
Holt, Parker
Lipscomb, Hubert S.
McCarroll, Clarence
Pledger, Charles E., Jr.
Tressler, David L.
Barton, John L., Ex Officio

Report of Fidelity and Surety Law Committee

DURING the past year the activities of the Fidelity and Surety Law Committee have been largely confined to a contribution to the Open Forums Program for the Annual Convention.

A Mid-Winter Meeting of the Committee was attempted, but later abandoned as impractical. Instead, by correspondence between members, officers and the personnel of the Open Forums Committee, topics were discussed, concluding in a Program and speeches as announced in the Pre-Convention Issue of the Insurance Counsel Journal.

The Committee Personnel have also attempted to submit to the Insurance Counsel Journal articles of timely interest and in this regard have at least been partially successful. It is felt that attention should be directed, at the suggestion of Mr. George M. Weichelt, to a further authority, not specifically commented upon therein, as a supplement to his article appearing in the April 1951 issue of the Insurance Counsel Journal entitled, "Termination of Surety's Liability."

That is to direct attention to the case of *Dollar et al v. Land et al,* 184 Fed. 2d 419. To direct particular attention to the attitude taken by the Court, referring to release of surety. In that case the Dollar Steamship Lines borrowed large sums of money from the Government. Certain stockholders guaranteed the notes. This went on for a number of years, and there came a time when it was deemed advisable to transfer the stock of the corporation which had been pledged as security for the notes. In consideration of doing this, the shipping board released the surety. The loans were eventually paid, and the Government contended that it was the owner of the stock which had been transferred outright. That portion of the decision particularly referred to, held in substance that the stock was merely security regardless of whether it had been transferred; and under the principles of suretyship, the debt having been paid, the surety was released and ordered the stock returned. This case has been in the press recently in reference to contempt proceedings against the Secretary of Interior, and others who refused to turn over the stock. As a matter of fact, as of this dictation, that angle of the case is still pending.

Attention might likewise be beneficially directed to recent decisions, of interest and benefit to companies underwriting Contract Bonds.

The first, a decision in the United States District Court for the District of North Dakota, Southwestern Division, 94 Fed. Supp. 177. The case of *Seaboard Surety Company,* plaintiff, *v. State of North Dakota, et al,* defendants. The surety, having paid third party claims under its statutory bond on behalf of the Highway contractor, sought, as against the bank assignee, to impress a prior equitable lien, upon the retained percentages held by the highway department. The Court made a thorough examination of the authorities upon this familiar issue in other jurisdictions. This case was one of first impression on this conflict of interest in North Dakota. The Court found for the interest of the surety as against the bank.

The second, a decision in the District Court of Salt Lake County, State of Utah, in January 1951. While not a decision of a Court of last resort it nevertheless is of decided importance. It is the case of *Seaboard Surety Company and Palfreyman Construction Company,* plaintiffs, *v. State Road Commission, Engineering Commission and Commission of Finance, all commissions of the State of Utah,* defendants. In this case the contractor and the surety, as its assignee, sought to recover extra compensation for additional rock quantities excavated on an unclassified highway contract, for which quantities the contractor contended it had not been compensated. Although the recovery effectuated by the plaintiffs was not as substantial as the amount sought, it is nevertheless felt that the contentions of the plaintiffs were recognized by the Court to such an extent as to modify considerably the adverse position which the contract sureties have had in the State of Utah ever since the decision handed down in the Supreme Court of that State in the case of *Campbell Building Company v. State Road Commission,* 70 Pacific 2nd 857. The decision being upon the question of the finality of the Engineer's decision in the administration of a highway contract.

In the *Seaboard* case, the Court, while it agreed that the contracting parties are bound by their agreement to be bound by the Chief Engineer's decision as to the amount and quantity of the several kinds of work performed and materials furnished by the contractor, nevertheless, such decision will not stand if it can be shown to have been made arbitrarily. On such state of facts the Court did find that the Chief Engineer's decision did not reflect his honest judgment, and was therefore arbitrarily made and must be set aside. This case is not cited as actually modifying the legal principle set forth by the Supreme Court in the *Campbell* case, but rather, as bringing forward a state of facts which could make operative the exception to the established rule as to the finality of the Engineer's decision.

In conclusion, your Committee recommends that the succeeding Committee, for possible Open Forum contribution, or paper to be prepared for the Insurance Counsel Journal, consider the topic: "The Effect and Scope of a Superseded Suretyship Rider."

Respectfully submitted,

WALTER A. MANSFIELD, *Chairman*
HAROLD W. RUDOLPH,
Vice Chairman
GEORGE M. WEICHELT,
Vice Chairman
JOHN M. ALLISON
A. L. BARBER
WM. D. BUCHANAN
KENNETH B. COPE
W. BRAXTON DEW
ROBERT L. EARNEST
GALLITZEN A. FARABAUGH
E. SMYTHE GAMBRELL
HOBART GROOMS
PAUL N. HIGINBOTHOM
ARTHUR A. PARK
SHELDON S. REYNOLDS
H. MELVIN ROBERTS
ALLEN WHITFIELD
MELVIN H. ZURETT
ERNEST W. FIELDS, *Ex Officio*

Report of the Financial Responsibility Laws Committee

THIS report directly supplements the committee's previous reports as to financial responsibility laws generally, printed in the July 1948 and October 1949 issues of the Journal. (Last year's report, printed in the July 1950 issue of the Journal, pertained to the related subject of unsatisfied judgment laws.)

A. *Legislative Developments*

1. *"Security" Laws* There has been a steady continuation of the trend in favor of "security" laws—i.e., those embodying the principle of requiring security for the past accident as a condition to retaining motoring privileges. It now is easier to list those states which do not have such legislation than those which do, since the latter now includes the following 36 states and Hawaii (dates shown are the effective dates of the "security" provisions):

New Hampshire (1937)
Maine (1941)
New York (1942)
Indiana (1943)
Michigan (1943)
Vermont (1943)
Massachusetts (1945)
(applicable to non-residents, supplementing the compulsory law)
Minnesota (1945)
Nebraska (1945)
Virginia (1945)
Illinois (1946)
Maryland (1946)
Wisconsin (1946)
Colorado (1947)
Idaho (1947)
Iowa (1947)
Kentucky (1947)
California (1948)
North Dakota (1948)
Wyoming (1948)
Florida (1949)
Nevada (1949)
Tennessee (1949)
Hawaii (1950)
Oklahoma (1950)
Pennsylvania (1950)
Washington (1950)
Georgia (July 1, 1951)
West Virginia (July 1, 1951)
Oregon (August 2, 1951)
Utah (September 1, 1951)

Montana (October 1, 1951)
Arizona (January 1, 1952)
Delaware (January 1, 1952)
Texas (January 1, 1952)
Connecticut (July 1, 1952)
Ohio (March 1, 1953)

Some older type of financial responsibility law is now in force in the following 12 jurisdictions, including Connecticut and Ohio which have enacted "security" laws effective after January 1, 1952 (the symbols "A", "J" and "C" denote the law's application to accidents, judgments and convictions respectively):

Alabama (J, C)
Arkansas (J)
Connecticut (C)
District of Columbia (J, C)
Kansas (J, C)
Missouri (J, C)
New Jersey (A, J, C)
New Mexico (A, J, C)
North Carolina (A, J, C)
Ohio (J, C)
Rhode Island (A, J, C)
South Dakota (J, C)

Thus, only the 3 states of Louisiana, Mississippi and South Carolina now are without any legislation in this field. (In Louisiana, a "security" bill received a somewhat unexpected executive veto in 1950.)

2. *Amendments and Innovations under "Security" Laws*

(a) *Extraterritorial Reciprocity* In 1950, the "model bill" of the Association of Casualty and Surety Companies revised the Non-Residents section, so as to make the law more effective both as to non-residents and accidents in other states in which residents were involved. Under the revised section, when a non-resident becomes subject to the security requirements and fails to comply therewith, record of the fact is forwarded to the motor vehicle authority in the motorist's home state, for revocation or suspension of license and registration, as though the accident had occurred in the home state, until the motorist complied with the requirements of the state where the accident occurred. Conversely, similar action would be taken with respect to residents who were involved in accidents in outside states having similar legislation. By thus operating on a reciprocal basis, the revised provision should tend to encourage similar provisions being enacted in other states.

This important new principle was included in the "security" laws enacted this year in Arizona, Connecticut, Montana and Utah, and was added this year by amendment to the Tennessee law. To the extent that such provisions become more universal, the effectiveness of the "security" laws will be sharply increased.

(b) *Increase of Security Limits* New York this year amended its law to require that, effective July 1, 1951, the required minimum bodily injury limit of voluntary or filed insurance be increased from $5000/$10,000 to $10,000/$20,000, with the maximum security deposit thereby increased from $15,000 to $25,000. The Connecticut law, enacted to take effect on July 1, 1952, asserted minimum bodly injury limits of $20,000/$20,000.

The declared basis of such action was one of meeting the inflationary spiral; i.e., the shrinking value of the dollar made the higher limits comparable to "standard" $5000/$10,000 limits as of ten and more years ago. However, many persons close to the subject and interested in the successful functioning of "security" laws are apprehensive that the result of the higher minimum limits will go far beyond reflecting inflation and may endanger the successful operation of the law as a whole, particularly in Connecticut which has no existing "security" law and where the highest limit has been imposed.

These apprehensions are based in part on the following reasons: (1) Most uninsured motor vehicle owners are uninsured largely on a basis of cost. The prime purpose of these laws is to encourage, without legal compulsion, greater voluntary efforts at maintaining financial responsibility in advance of accident, usually through the purchase of automobile liability insurance. It is felt that, to the extent that the higher limits add 15% in

New Work and 20% in Connecticut to the already high and mounting cost of the insurance, a deterrent is imposed in the way of inducing the maximum number voluntarily to insure. To the extent this is true, the law will fail of its purpose.

(2) Under these higher limits, instances will occur—particularly as to non-residents, the laws of whose home states require lower limits — where voluntary insurance is in fact adequate to meet all possible damages flowing from an accident; yet literally, because of the higher limits requirement, the insurance cannot be recognized and the motorist will have to make an unnecessary standby deposit in order to retain his motoring privileges. Such operation of the law in New York and Connecticut will certainly cause strong public resentment and possibly lead to abandonment of the law in favor of some more radical or less happy measure. Also, the spread and effective operation of the new reciprocal provisions, discussed above, will be seriously affected.

(3) At present, estimates of the insurance industry are that less than 10% of the automobile accident claims are not settled within the traditional "standard" liability limits. An official study by the State of Illinois showed that in 1949, as to the amounts required to be deposited as security under the Illinois law, 91% of the claims were for less than $1000, and but 1% was for more than $5000. While the Illinois figures may not be typical, it seems clear that the higher statutory limits are needed in only a disproportionately small number of present cases.

(4) To a large extent, the higher statutory limits will tend to influence the amount of verdicts and settlements, and so further increase the cost of liability insurance.

(c) *"Tempering" the Security Requirement* Indiana by amendment has made the security requirement discretionary with the Commissioner. North Dakota has followed California in requiring security only at the instance of the claimant. Bills are pending in Hawaii and Pennsylvania which would make the security requirement applicable only after the motorist had been adjudged to be at fault as to the accident. A pending Michigan bill would give the Commissioner authority to suspend the security requirement to allow a motorist to pursue his gainful occupation or where the "equities" appear to justify such action.

Such amendments doubtless are the result of strong local pressure and are believed by some to make the law more palatable or more practical in operation. However, there is danger that, by so relaxing the rigidity of the security requirement, the prime purpose of the law is greatly weakened or defeated, with adverse effects to the motoring public as a whole.

(d) *Increase of Property Damage Minimum; Simplified Administrative Procedure* Developments along these lines, reported in the October 1949 Journal, appear to have received general favor.

3. *Amendments to Financial Responsibility Laws*

Arkansas has corrected the basic weakness under its law as to unsatisfied judgments, so that a motorist must both satisfy the judgment *and* file proof for the future. Previously, this was an alternative requirement, which thus resulted in a complete "first bite."

Georgia has just enacted a "security" type law, including provisions requiring proof for the future in the event of certain convictions. Georgia previously had a law applicable only to unsatisfied judgments and this law now stands repealed, an action which certainly does not follow from the enactment of "security" legislation, to which the unsatisfied judgment law would be a desirable counterpart.

Maryland last year amended the unsatisfied judgments part of its security law, so that a running of the statute of limitations should amount to satisfaction. This action obviously runs counter to the original purpose of the legislation, and to its express provision that bankruptcy does not amount to satisfaction. To the extent the unsatisfied judgment provisions have significance, the Maryland amend-

ment would increase the possibility of a "first bite."

4. *Compulsory Insurance*

This year's general legislative session showed, as usual, the introduction of compulsory automobile liability insurance bills in several states. The number of such introductions was less than in 1949 and still less than in 1947. No general compulsory measure had been enacted or appeared likely of enactment when this report was released. The only successful efforts at compulsory legislation occurred with respect to minors in two states. In New York, minor owners will be required to maintain $5000/$10,000 bodily injury insurance as a condition of registration—action slightly inconsistent with the higher limits adopted at the same session for voluntary insurance generally. Connecticut, which already has similar compulsory legislation for minor owners and also for minor operators under 18, extended the latter age limit to 21.

5. *Unsatisfied Judgment Funds*

No state except North Dakota has as yet enacted such legislation. New York and Michigan appear seriously to be studying the advisability thereof, and have created interim study commissions. North Dakota amended its law (a) to make provision for hit-and-run cases and (b) to prevent abuses through default judgments.

B. *Security Laws in Operation*

In many respects, these laws have fully achieved the aims of their proponents in effecting a progressive increase in the number of insured motorists, and in inducing the uninsured motorist to deposit security or to arrive at a settlement agreement with adverse parties.

The 1950 annual report of the New York Motor Vehicle Bureau, released in May 1951, contains much significant data. The previous high figure of 94% insurance coverage continues to hold and "the Safety Responsibility Law must be credited with this remarkable achievement." $1,313,550 was deposited as security, serving as a potential reservoir to meet the claims against uninsured motorists. Over 22,000 releases were filed, evidencing settlement arrangements between the parties.

The Report expressly made the point, that there was no evidence that the group of uninsured motorists was *per se* accident prone or financially irresponsible. (Such a conclusion sometimes is assumed, without foundation. Contrast the official Illinois figures which in 1950 showed that *uninsured* motorists who were *not financially* responsible made up only 1.15% of all motorists involved in reportable accidents, and that they produced 9 property damage claims for every 1 of bodily injury or death.)

With respect to the paramount problem of increasing highway safety, there is indication that in New York, Indiana and certain other states, the enactment and operation of the "security" type of law has been a positive factor in promoting safe driving.

One significant recent development is an analysis of the comparative amount of supplemental automobile insurance coverage and protection which is in force, in addition to the "standard" bodily injury liability limits of $5000/$10,000. This analysis (made by an insurer last February for the information of the New York Insurance Department, and based on figures of the National Bureau of Casualty Underwriters and the Massachusetts Automobile Rating Bureau) estimated that:

1. Countrywide, between 65% and 70% of the bodily injury liability risks also purchased medical payments coverage; in Massachusetts, only 35%.

2. Countrywide, over 90% of the bodily injury liability risks carry property damage liability; in Massachusetts, round 65%.

3. Countrywide, about 63% of the bodily injury liability risks carry higher-than-standard limits; in Massachusetts, 48%.

This data would indicate that the philosophy of the non-compulsory type of law tends to result in broader and better protection to the public, and thus copes more effectively with the problem of the uncompensated automobile accident, than has been true under the one compulsory law.

C. *Present State of the Automobile Accident "Problem"*

The increased enactment and operation of the "security" type of law has not entirely stilled the legislative and public concern over the social problem of the uncompensated victim of an automobile accident. It is significant that even in New York, despite the apparent success of its "security" law, serious attention is now being given by a Joint Legislative Committee on Motor Vehicle Problems to whether compulsory insurance, and unsatisfied judgment fund or some other expedient is needed or desirable. (As to compulsory insurance, this proceeds in part from the paradox that, with as few as 6% of the motorists uninsured, no real objection can exist to imposing compulsion on so small a group. That is, the success of the "security" law is made an argument in favor of compulsory insurance!)

Future developments will depend in part upon whether the "problem" is regarded as that of the uninsured motorist merely, or is the broader one of the social and economic disruption and loss produced by any automobile accident causing bodily injury or death. Some such loss is inevitable, except as alleviated by private insurance plans, under our present system of tort recovery based on the sole or major fault of another.

Certainly, there must be increased efforts at reducing accidents, through effective safety work and motor vehicle administration. Further, if the "security" type of law is to be an ultimate success, it must meet this challenge (contained in the comprehensive address made by Alfred J. Bohlinger, New York Superintendent of Insurance, before the New York State Association of Insurance Agents at Syracuse on May 7, 1951):

"With the attention of the public concentrated on the problem (of the uninsured motorist), we cannot afford to stand pat and merely *say* that the present system in New York State does the job . . . If we believe it does, we should be able to demonstrate with facts and statistics the basis of our belief . . . The problem will confront all of us until we have solved it to the satisfaction of the public."

Respectfully submitted,

John P. Faude, Chairman
J. H. Gongwer, Vice Chairman
Warren C. Tucker, Vice Chairman
Thomas J. Agar
Sam Rice Baker
Herbert L. Bloom
James C. Cheek
John E. Foster
Arthur B. Geer
George E. Heneghan
John A. Henry
W. L. Kemper
Edward W. Kuhn
Charles E. Moul
Warren Nigh
Richard C. Wagner
William A. Wickham
Franklin J. Marryott, Ex Officio

Report of the Fire and Inland Marine Committee

DURING the past year the Fire and Inland Marine Committee of the International Association of Insurance Counsel has concentrated upon an intensive study of the problems which arise in connection with property damage insurance as the result of the development and use in peace and war of atomic energy. In order to study the many problems more effectively two sub-committees were established, one to consider possible amendments to Federal statutes with respect to the liability of the Federal Government and the Atomic Energy Commission, the second to consider possible changes in the wording of property damage insurance contracts to meet the hazard of damage done by atomic bombs, peacetime nuclear fission and the use of radioactive isotopes.

The Chairman appointed the following sub-committee on Federal Legislation:

JAMES D. FELLERS, *Chairman*
CHARLES G. BEACH
SAMUEL LEVIN
RUSSELL H. MATTHIAS
ARMISTEAD W. SAPP
M. L. LANDIS
S. BURNS WESTON
EDWARD L. WRIGHT

The Chairman appointed the following sub-committee on Insurance Contract Amendments:

NEWTON GRESHAM, *Chairman*
PINKNEY GRISSOM
WILLIAM B. MANGIN
FRANK C. MANN
DELOSS P. SHULL
WAYNE VAN ORMAN
THOMAS WATTERS, JR.

The Joint Fire and Marine Insurance Committee asked that a representative of this Committee meet with them in the capacity of legal adivsor so that they might have the benefit of our research on the problems under study. The Committee authorized its Chairman to act in that capacity and he has since attended the meetings of the Joint Fire and Marine Insurance Committee on Radiation.

A careful study has been made of possible amendments to the Federal Tort Claims Act and a number of suggestions have been made with reference to possible changes. It is the hope that through such amendments it will be possible to clarify the liability of the United States Government in the event of loss to property or injury to person arising out of the operations of the Atomic Energy Commission. This subject will be discussed at length at the Open Forum to be given at the Greenbrier meeting and after that discussion, it is hoped that final recommendations may be drafted.

The sub-committee on Insurance Contract Amendments has found that the differences of opinion between insurance companies as to basic policy has made it extremely difficult to prepare a definite report. The National Board of Fire Underwriters has announced its desire to exclude from all property damage contracts damage done by the explosion of atomic weapons. It is not indicated as yet how this is to be accomplished in the case of the Standard Fire Insurance Policy but some new versions of the Extended Coverage Endorsement have such an exclusion. A similar exclusion has been adopted for Inland Marine policies likewise excluding damage done by the explosion of atomic weapons. The situation is further complicated by the fact that the War Damage Corporation has not yet been reactivated and there is, therefore, some uncertainty as to the degree to which it will provide protection against loss or damage due to atomic explosion.

The Committee has arranged for an Open Forum discussion on the subject of "Liability and Insurance for Atomic Energy Operations." Through the medium of this Forum it is anticipated that it will be possible to place the latest information before the members in a field in which almost weekly changes have been taking place during the year.

Respectfully submitted,

AMBROSE B. KELLY, *Chairman*
CHARLES G. BEACH
JAMES D. FELLERS
NEWTON GRESHAM
PINKNEY GRISSOM
M. L. LANDIS
SAMUEL LEVIN
WILLIAM B. MANGIN
FRANK C. MANN
RUSSELL H. MATTHIAS
ARMISTEAD W. SAPP
DELOSS P. SHULL
WAYNE VAN ORMAN
THOMAS WATTERS, JR.
S. BURNS WESTON
EDWARD L. WRIGHT
L. DUNCAN LLOYD, *Ex-Officio*

Report of Health and Accident Insurance Committee

THE matter of outstanding interest in the Health and Accident Insurance Field this year is the proposed uniform individual Accident and Sickness Policy Provision Law. After three years of research and discussion, the Health and Accident Insurance representatives and The National Association of Insurance Commissioners agreed upon, and in June, 1950, adopted a draft of the law to be submitted to the State Legislatures. It does not apply to Group or Blanket Accident and Health Insurance.

The need for the changes proposed is well summarized in the following excerpt from explanatory comments distributed by the Bureau of Accident and Health Underwriters:

> "Most existing laws with respect to policy provisions for Accident and Sickness Insurance are based on the 'Uniform Standard Provision Bill' which was adopted in 1912 by the National Association of Insurance Commissioners. Under this Bill, statutory policy provisions are generally required to appear in the policy verbatim and in order. The 1912 Bill was drafted in the light of the business as then conducted and did not anticipate future changes. The business has developed through the introduction of types of coverages not contemplated in 1912 and through changing concepts of the relative rights of insured and insurer. The 'in the words and in the order' requirement has created difficulty because of minor variations in the wording and the printing of the states' laws. It has prevented the companies from writing contracts containing more liberal claim procedures even though such procedures would be of benefit to the insured and would be practical and helpful to the company in its effort to provide better service."

The proposed law is drafted to permit the use of the statutory provisions in substance or in a form which, in the opinion of the state official having supervision of insurance, are not less favorable to insureds and beneficiaries. The "in-substance" approach achieves the following purposes:

1. It permits greater flexibility in policy drafting, thus making it possible for policy provisions to be up-to-date at all times, keeping in step with trends and improvements in the business.
2. It permits companies to experiment with policy provisions more beneficial to the insured and his beneficiaries, thereby encouraging competitive development, which is in the public interest.

Uniformity in the adoption of the proposed law by the Legislatures of all of the states, would permit the use by a company of the same policy forms in all states, thus saving the companies and policyholders the added heavy expense for printing and administering extra sets of policies, and also reducing the burden on State Insurance Departments. It would also be hoped that more uniform judicial opinion would result from uniformity in the regulatory pattern, though history is not too reassuring.

No subject of the 1912 law of importance to the interest of policyholders has been omitted from the proposed law, and substantial additional protection is afforded policyholders and claimants through the introduction of the following important provisions not found in the present law:

The surrender by the insurer, after three years, of the right to base a defense upon a misstatement in the application or upon prior origin of any condition.

Provision for a grace period for the payment of any premium after the first, during which grace period the policy shall continue in force, unless the insurer has given advance notice of its intention not to renew.

Provision liberalizing the conditions for reinstatement of lapsed policies.

Extends period for giving notice of sickness claims from ten to twenty days.

Provision to forgive late filing of proof of loss where it was not reasonably possible to give such proof within the time otherwise required.

Period of time for commencing legal actions is increased from two to three years.

Provision that the insured shall have the right of cancellation if that right is

retained by the company, and that in the event of cancellation by the company advance notice of not less than five days must be given.

The status of this new law in the various State Legislatures, as reported on June 22, 1951, is as follows:

Has been enacted in 13 states. Arkansas, California, Colorado, Connecticut, Iowa, Hawaii, Kansas, Maryland, Michigan, Nebraska, New York, Pennsylvania, and Washington.

Was passed in both houses of the legislature, and is awaiting the Governor's signature in 3 states. Illinois, New Jersey and Wisconsin.

Has passed in the House only, but is expected to pass in the Senate and to be signed by the Governor in 2 states. New Hampshire and Texas.

There are 10 states where there is no present law in conflict with the principles and practices provided in the proposed uniform law. In those states, the companies probably will use the new policy forms. They are:

Arizona	Montana
Delaware	Rhode Island
Georgia	Tennessee
Louisiana	Utah
Mississippi	Vermont

The bill was presented and failed in 2 states: Florida and West Virginia.

It was presented and postponed in 2 states: Massachusetts (to 1952); and North Dakota (to 1953).

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ALEXIS J. ROGOSKI
V. J. SKUTT
LOWELL WHITE

Report of the Highway Safety Committee

THE present appalling highway toll must be of concern to any person interested in the welfare of his community, state and country. The 11 per cent increase in traffic fatalities recorded in 1950 over the previous year calls for immediate action by all of the groups organized to contribute to accident prevention.

It was the desire of this committee to get at the heart of the highway safety problem in this country, and to suggest certain remedies, which we consider to be basic and most pressing at the present time.

This year this committee has made a survey of the statutes of the 48 States having to do with the operation of motor vehicles on the highways. In addition to obtaining this information, the committee has also contacted various safety officials throughout the entire United States to ascertain their problems in highway safety and the means at their disposal to combat them, along with their recommendations for further promotion of safety on the highways. This report is gleaned from the vast amount of information and expressions of the safety officials.

This highway safety committee realizes that this report has barely touched the surface of the many problems in highway safety. However, the committee does feel that the problems calling for more urgent attention are (1) increasing the number of and training for Highway Patrolmen and personnel, (2) the adoption of a uniform Motor Vehicle Law by all the states which would not only govern motor vehicles, but also pedestrians, and (3) compulsory highway safety education in the schools. The educational program should stress the Driver Training Program, and, although it has a good start in many schools, it is still an open field and requires immediate attention.

Major Violations

What violations or "causes" result in the greatest number of accidents? A director of Motor Vehicle Division of one of the Southern states explains that a majority

of the accidents involve two or more violations, any of which may be designated as the "cause" of the accident by the investigating officer, and the major contributing violation being hidden in the case of careless and reckless driving. In an effort to get at something tangible with which to work, we requested that these safety officials give us their opinion of what the three leading violations were, and they are (1) Too Fast for Conditions, (2) Failure to Yield Right of Way and (3) Excessive Speed. By way of contrast, the National Safety Council lists them as (1) Speeding, (2) Wrong Side of the Road and (3) Following Too Closely. You will note that we list "speed" in the third place. New Jersey also ranks speed third. Speed is the number one cause of fatal accidents, and this statement is well supported by practically all of the safety officials throughout the country. Those listed next in order of importance are, Drunken Driving, Driving on Wrong Side of Road, Following Too Closely, Inattention, Reckless Driving, Bad Driving Attitude, Improper Start from a Parked Position, Lack of Driving Skill, Model "T" Operation of Modern Automobiles, Fatigue, Improper Passing, and Winter Road Conditions.

Enforcement

What are the solutions for abating the number of accidents resulting from these violations? Many cities and states have accomplished a great deal toward reducing the number of accidents, and many are well along in their programs for greater highway safety. Yet there is always room for improvement. Several of the officials say that the present legislation is fairly adequate, but all were of the opinion that the number of Highway Patrolmen should be increased. Until that can be done, and even after that has been accomplished, it will be necessary to constantly train the highway patrol personnel to develop the highest efficiency possible. The volume of traffic is steadily increasing on the rural highways, and it is imperative that the number of Highway Patrolmen be increased accordingly. Not only is the volume of traffic increasing, but the number of miles of roads is increasing. If each state were to consider the number of miles of road to be patrolled and the present number of patrolmen, and then figure how many miles each patrolman should patrol, in practically every instance it would be found that one patrolman cannot patrol that much territory and do the job as it should be done. One state had 423 patrolmen, and if the total mileage of roads were equally divided, each patrolman would be responsible for approximately 140 miles. It is obvious that no one man can patrol that many miles efficiently, no matter how capable. By maintaining an adequate number of patrolmen, a selective enforcement program can be executed by directing radio cars and motorcycle men to the intersections and other points where the greatest number of accidents occur. Each officer should be trained to investigate thoroughly by using tape measures, cameras, etc., such information to be used as an aid to determine what should be done in the future to prevent future accidents in general, as well as at the particular scene or intersection. To give this training, more schools such as Northwestern University Traffic Institute should be set up in each state.

Aids to Enforcement

One of the suggestions for the promotion of Highway Safety is that the investigating officer enforce the law strictly, favoring no one. Some states favor strict enforcement, but at the same time it is believed that the investigating officer should be practical. To assist the officer, one state uses a uniform traffic ticket. These forms are so organized that they not only note the actual violation, but also other factors, such as time of day, traffic, conditions of roads, schools, weather conditions, etc. Then some sort of numerical calculation is used and this determines whether (1) the driver will be merely cautioned, (2) a ticket will be issued but the driver will merely be cautioned at the Police Station, or (3) a ticket will be issued and the driver will then be fined according to the seriousness of the entire situation instead of just the offense itself. Thus, a man driving 30 miles an hour on a straight of way without traffic and on good roads would probably not even be bothered, while the same man driving 30 miles an hour in heavy traffic near an intersection and a school zone, and having near collision with other vehicles might for the same violation be given a ticket and suffer a heavy fine. The local police are quite enthusiastic about this type of ticket. With the proper training of each patrolman, this type of Uniform Traffic Ticket could be very successful in

every community over the entire country.

A radar vehicle speed detector has been of great assistance to the Highway Patrolmen, and is being used in many states with great success, including Maine, Ohio, New York, Connecticut, Arizona, and New Jersey. This device is used to make speed studies and as an enforcement threat. In one locality, four speeders were arrested by using the radar machine to gather evidence. Of the four accused presented, all were found guilty and fined. One operator appealed the decision, but before the case was tried in their Superior Court, he withdrew the appeal and paid his fine. Briefly, this detector consists of a handy, carborne apparatus weighing only forty-five pounds. A transmitter-receiver unit in a small black box is placed on a fender with its black glass front facing oncoming traffic. The power unit is plugged into the police car's battery. A recorder containing a roll of graph paper and a visual speed indicator is hung near the car's steering wheel. As an approaching vehicle flashes into the range of the radar (within about 200 feet), an automatic pen on the graphic recorder traces a line that gives a permanent record of the vehicle's speed. The policeman jots down the license and description of the violator, and radios them to a second police car stationed a mile farther along the highway. The speeder is flagged without the customary chase. Motorists are amazed upon learning how they were detected.

One safety official sent us this idea: A group of citizens is selected, their names undisclosed, and each requested to report any violations they see to the club. A card is sent to the violator with a warning. If this same violator receives several of these cards, he is called to report at the local police station for further measures.

Legislation

Among the solutions suggested for furthering highway safety, is more and better legislation pertaining to the regulation and operation of motor vehicles. In the committee's survey of the Motor Vehicle Laws in all the 48 States, we found that all the states had the same type of laws, but with variations, especially in fines and penalties and other requirements adapted to that particular locality. Many have expressed a desire for a Uniform Motor Vehicle Law, but some say that the present legislation is sufficient, their problem being stricter enforcement of the existing laws. There is some merit in this opinion, but it is generally agreed that a Uniform Motor Vehicle Law would help prevent accidents, especially in the case of tourists. For instance, there are states which are not using the standard chrome color with black trim and lettering for their school buses. A vehicle bearing this color would be recognized instantly as a school bus, no matter where it was seen. Many states require motorists to stop when meeting a school bus, but not when following. Fines and imprisonment for convictions vary from state to state, and such penalties should be heavy, especially in the case of drunk driving. It would be a little difficult to have a uniform speed law, the speed being governed by the population, density, topography, and other factors peculiar to the particular locality, but the fundamental principles of safe driving should be uniform in their application. One piece of legislation proposed more often is a Financial Responsibility Law *with teeth in it*. The general statement has been aptly made that only one in four who are involved in traffic accidents is in a position to pay for the damage or injury he caused. A few years ago New York State operated under a law similar to many of the existing Financial Responsibility Laws, and they had the same experience. So they, in disgust, overhauled their law, put teeth into it, and now better than 85 per cent of their operators are financially responsible and carry liability insurance. They have been operating under the present law for several years, and they report very favorable experience with it.

Periodic re-examination of drivers is mandatory in some states, ranging from every two years to six and nine years, while many states only require that the driver's license be renewed every two years or so, with no re-examination. A compulsory semi-annual inspection of motor vehicles *by the state* will keep many of the "traps" off the highways, and if such an inspection is thorough, excellent results will be achieved. There is certainly a necessity for legislation to establish a *prima facie* case of being under the Influence of Alcohol or Narcotics as determined by Chemical Tests of the subject's body fluid. The chemical analysis is most desirable and provides an accurate method of determining the presence and effect of alcohol. Recently, a rash of "hot-rods" has broken out all over the country and because of

their speed they have caused many serious accidents and fatalities. In fact, "hot-rods" are so recent that there has been no legislation to keep them off the highways. It has been suggested that there be either permanent license plates for vehicles, or legislation prohibiting motorists from purchasing plates in any other county aside from the county in which they reside. This would greatly facilitate police work. Also, that it be compulsory for every vehicle to be equipped with a speedometer in working condition at all times, just as present legislation makes it necessary to have window wipers, rear vision, horn, etc.

Education

The suggested solutions heretofore mentioned may give immediate relief and certainly should be followed up in the future, but for a long range program there should be compulsory safety education in the schools. This program would begin with the younger children long before they become of age to drive. Working in conjunction with the City Police Department and with the State Highway Patrolmen, some schools are devoting a certain amount of time each week to teach the youngest children, from the primary grades on up, about traffic controls, when and where to cross a street, how to walk along highways, etc. Safety Patrol Boys have been of great assistance to the police along these lines and, even though this program is well along, it could stand strengthening. However, at the present time greater emphasis needs to be placed on the Driver Training program in the high schools. As a prerequisite and a necessity, there must be a school to train those who will go into the high schools to teach the Driver Training Classes. These courses should not only include class room work, but behind the wheel training before the course is completed. It is the opinion of many that completion of the Driver Training course should be a prerequisite to graduation, and this committee agrees that such importance should be attached. A few states have had wonderful success with this course in their high schools. The records over a period of time from a number of cities have shown that students who have had such training have fewer than half as many accidents as students who had no such training. In fact, the good record of these trained drivers is such that it has been recognized by at least one insurance company which last spring announced that its automobile liability insurance rates for persons under twenty-five where they had such driver-training will be the same as for adults. This is fitting recognition of the practical value of driver-training instructions in the schools. Not only will this training result in cutting down accidents for these youthful drivers and enabling them to procure insurance at a considerably reduced amount, it will also result in fewer deaths and injuries and less property destruction for the public and greater peace of mind for parents. In one state a survey showed that of 515 students who had taken the driver-training program, 11 were involved in one accident the first year, and three were involved in two accidents each. The second year, 21 were involved in one accident each (4 repeaters) and one was involved in two accidents. The first year there were 19 convictions, and the second year, 13 convictions. There is no doubt that the Driver Training Program is the means by which the number of highway accidents can be reduced. Such a program should not be limited to students alone, but should be available to school bus drivers and various business firms who use trucks in their business. One official says that the driver training program in his state is very successful in that of the approximately 11,000 school bus drivers, operating about half as many buses, there have been only 170 accidents, and in the majority of these cases the driver of the bus was not at fault.

The Pedestrian

Along with the slow driver, the pedestrian is often the party really responsible for highway accidents, including head-on and rear-end collisions, because of the attempt of one of the operators to avoid striking him.

Some of the states are beginning to realize that the pedestrian should be subjected to penalties for jay walking or crossing streets regardless of red lights, intersections or corners. New Jersey has recently passed a new traffic code which makes jay walking a serious offense, with fines up to $50.00 and possibly a jail term up to 15 days. The educational program should also emphasize the training of the pedestrian public to observe traffic lights and to cross only at intersections.

Conclusion

To reiterate, this highway safety committee believes that present tragic traffic problems may be ameliorated by:

(1) Increasing the number and improving the training of Highway Patrolmen;

(2) The adoption by all states of a Uniform Motor Vehicle Law governing vehicles and pedestrians;

(3) Compulsory highway safety education in schools, including a Driver Training Program in secondary schools.

As projects for future committees and to effectuate the above recommendations, this committee suggests that this Association tender its assistance to any organization interested in this over-all problem in the drafting of rules or legislation and the establishment of outlines of training courses.

This committee takes this opportunity to express its appreciation for the efforts of the commissioners of safety and other safety officials in furnishing information and comments for the promotion of highway safety.

Respectfully submitted,

TAYLOR H. COX, *Chairman*
EDWARD C. BREWER,
Vice Chairman
MARK TOWNSEND, JR.,
Vice Chairman
HUGH D. COMBS
CLARENCE R. CONKLIN
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JAMES OLDS
CULVER SMITH
FORREST S. SMITH
DONALD J. VANALSBURG
LEO B. PARKER, *Ex-Officio*

Report of Life Insurance Committee

AS has been customary in the past, considering the size of your Committee of 18 members and its geographical distribution among 13 states across the country, meetings of the Committee were impractical and committee activities have been carried on entirely by correspondence. This report accordingly is a composite of material submitted by the committee membership in the fields of litigation and legislation pertaining to life insurance. For the sake of conciseness not all material submitted could be included in the report, but it is the hope of the Committee that the matters covered will be of interest and service, both to trial counsel and home office counsel, in the life insurance field.

I.

Interest of Minor Contingent Beneficiary As Affected by Irrevocable Beneficiary Designation

One of the more perplexing problems touching the present day life insurance contract is the handling of the interests of minor contingent beneficiaries in a policy where the beneficiary designation is irrevocable. Too often the holder of such a policy and his counsel insist that with the consent of the living primary beneficiary the insured may deal with the policy as his own, disregarding the rights and interests of minor contingents. Tax saving programs contribute materially to this confusion, ignoring as they do quite often the long range legal effect of tying up a life policy irrevocably where minor beneficiaries are involved. Authorities directly in point have been lacking, leaving determination of the question dependent upon general authorities touching vested interests in life insurance policies, including the vested rights of contingent beneficiaries in their expectancy of benefit upon the death of the primary beneficiary. Where such vested contingent interest or expectancy is in the name of a minor then obviously that vested interest may not be disturbed or altered except by intervention of a legally appointed guardian, and quite often courts having jurisdiction of the guardianship may not permit alienation of the minor's interest in the policy.

Of particular interest therefore is the recent case of *Waller v. Waller*, 341 Ill. App. 204, 93 N. E. (2) 113, directly up-

holding the vested interests of such contingent beneficiaries and holding that such interests may not be alienated or extinguished without their consent. The facts substantially were as follows: Lucia T. Waller held policies of life insurance on her life issued by two companies. These policies named as beneficiaries the insured's husband and children in equal shares, and in the event the husband predeceased the insured his share was to be paid to his executors or administrators; if a child predeceased the insured his share should go to his surviving issue, if living, or to the executor or administrator of the deceased child. Both policies contained clauses making the designation of beneficiaries irrevocable. The insured assigned the policies to her son, William Waller and his wife, as trustees, at which time there were in being three minor grandchildren of the insured. The trustee-assignees, with the consent of the primary beneficiaries, unsuccessfully sought to surrender the policies, disregarding the minor contingent beneficiaries. The companies denied the right of surrender without recognition of the minors' rights and this suit followed. The minor grandchildren and possible unborn beneficiaries were not joined as parties in the action.

The trustees claimed the power under the assignment to surrender the policies for the cash value and denied that any of the grandchildren or unborn persons not made parties to the suit had any present or vested interest in the policies or were necessary parties to the proceedings. They also claimed that the grandchildren and the unborn persons were represented by the children and the trustees under the doctrine of virtual representation. The insurance companies maintained that the policies could not be surrendered without the consent of all the beneficiaries.

The insurance companies appealed from an adverse decree approving the trustees' surrender, and the Illinois Appellate Court (First District) reversed the decree, holding:

1. Where the designation of beneficiaries has been made irrevocable the beneficiaries under a life policy have a vested interest in it and the policy may not be surrendered without the beneficiaries consent.

2. The grandchildren and possible unborn beneficiaries had a vested interest as of the time the policy took effect and that they were therefore necessary parties to the suit. The trustees claim that the interests under the policy vested only in the husband and children of the insured and that the grandchildren had only contingent interests. The court refuted this theory saying at page 212:

> "The logic of such distinction is not apparent to us. None of the beneficiaries will know whether he takes anything under the policies until the death of the insured. The beneficial interests of the adults are no more certain than are those of the minor grandchildren, born or unborn. The rights of all are contingent, in the sense that they must survive the insured in order to take, and there is no more certainty that the so-called 'vested' interests will be effectuated than will be the so-called 'contingent' interests."

The court held that this case was within the general rule stated in Richards, The Law of Insurance 4th Ed., 1932 (p. 556-558)

> " 'The beneficiary's interest in a policy of life insurance is vested at the time the policy takes effect, if the right to change the beneficiary is not expressly reserved to the insured in the policy, otherwise it is not vested, and during the lifetime of the insured never rises above a mere expectancy.
>
> . . .
>
> " 'The effect of failure of the insured to reserve the right to change the beneficiary is to give the beneficiary a property right in the policy of which he may not be divested except by due process of law. Upon the maturity of the policy the proceeds are payable to the beneficiary. The insured cannot assign, or pledge the policy or receive a loan value or surrender and receive the cash value of the policy without the consent of the beneficiary. Nor can the insured and insurer acting together deprive the beneficiary of his right.' "

The court refuted the theory of the trustees that the grandchildren and unborn beneficiaries were not necessary parties under the doctrine of "virtual representation" saying at page 216:

"We disagree with the contention that the interests of the minor beneficiaries were represented by their parents, whose interests were identical with theirs, and by the trustees, as we have heretofore pointed out the interests of the minor beneficiaries and that of their parents and trustees are conflicting. The minors have valuable property interests in these insurance policies, which, if the contention of the parents and trustees is upheld, would be extinguished. It is a well recognized principle of law that in order to bind members of a class upon the doctrine of virtual representation, there must exist a community of interest between those to be found and their representatives. The interest of those who are absent must be identical with those who are before the court. *Weberpals v. Jenny,* 300 Ill. 145; *State Life Ins. Co. v. Board of Education,* 394 Ill. 301, 308, 309; *Mortimore v. Bashore,* 317 Ill. 535; *Downey v. Seib,* 185 N. Y. 427. Furthermore, the interest of persons not before the court will not be found by a decree in equity. *Newberry Library v. Board of Education,* 387 Ill. 85, *Pennoyer v. Neff,* 95 U. S. 714."

The portion of the decree appealed from was reversed and the cause remanded to the trial court with directions to make those persons indicated as having an interest, parties to the action.

Effect on Serviceman's Policy of Overpayment of Premium Allotments by the Government

Many life insurance companies issuing policies on the lives of servicemen, with premiums paid by allotments from their service pay, have found the United States Government, after the serviceman has been discharged from the service, or has otherwise terminated his allotment, erroneously has continued to pay allotments to the companies. After the error has been discovered, the Government generally has insisted that the companies refund these erroneous payments. It has been the position of the life companies generally that no such refund to the Government could be made as the allotments had been applied to the payment of premiums, the policies had been continued in force and the serviceman had received the benefit of the coverage, and there was no legal basis for the companies to declare a roll-back forfeiture of the policies where the premium allotments actually had been received. The companies have taken the position that in such cases the erroneous allotment payments stood on the same basis as other over-payments by the Government to servicemen and subject to the same rules of recoupment by the Government from servicemen.

Quite recently the Oklahoma Supreme Court in the case of *Atlas Life Ins. Co. Pltff. In Error, vs. Davis, Deft. In Error,* 14 Life Cases 580, 232 Pac. (2) 146, declared what the companies generally had always thought the law to be i.e.; that premium payments by a third person, even though unauthorized or erroneous are sufficient to maintain a policy in force and the company has no right to declare a forfeiture even though the Government had made such payments by erroneous allotment.

The facts in this case substantially were as follows: The Atlas Life Insurance Company issued to one Clyde H. May its policy for $1,000.00. The insured died in January, 1947. At the time of the issuance of the policy the insured was in the military service and had requested an allotment from his service pay to pay the premiums; shortly thereafter the insured cancelled this allotment. The Government, however, erroneously continued to make allotment payments to the company until after the insured's death; then discovering the error, demanded of the company repayment of the erroneous allotment payments.

The company set up the above facts, asserting that the payment of the allotment during the period of military service of the insured was not authorized and that the Government payment of the same was without authority of the insured and the policy accordingly never became effective. Plaintiff's motion for judgment on the pleadings was sustained and on appeal the Oklahoma Supreme Court affirmed the judgment, saying in part:

"It is undisputed that the policy was issued, and that the company received and retained all the premiums due upon said policy. The facts under the pleadings stand admitted. It is apparent, therefore, that the issue involved is whether the payment of premiums by a third party, or one other than the in-

sured, is sufficient to maintain a policy of life insurance in force and effect. We think it was, since, from the insurer's point of view, it is immaterial who pays the premiums and payment by a third party is sufficient. 14 Appleman Ins. L. & P., Sec. 8011; 44 C.J.S., Insurance, Sec. 347; 29 Am. Jur., Insurance, Sec. 421. (See cases under foot notes of the last named authorities.)

(Unauthorized Payment)

"It is contended under this proposition that the payment of the insurance premiums was unauthorized after the insured notified the military authorities of his election of withdrawal of his allotment, and to sustain this contention cites 30 U.S.C.A., Sec. 802 (m) (1), which provides: 'that any amount so advanced in excess of the available services or other pay shall constitute a lien on the policy within the provisions of Section 454A of this title.' It is obvious that this statute is no basis for relief to dedendant. In this connection defendant cites 10 U.S.C.A., Sec. 894, supra. This section simply provides that if erroneous payments are made, the same shall be collected by the Chief of Finance from the officer who fails to make proper report of such payments."

In another recent decision on this same point, the company refunded to the Government all of the erroneous allotment over-payments and unsuccessfully attempted to defend action on the policy on the theory that the allotment payments were in error and unauthorized and that the policy was not in force on the date of the insured's death. The Texas Ct. of Civ. App. at San Antonio, in the case of *Spyra, Appellant, vs. Government Personnel Mut. Life Ins. Co., Appellee*, 14 Life Cases 800, 236 S. W. (2d) 218, held that the payment of premiums by allotment, whether erroneous or otherwise, was sufficient to continue the policy in force and reversed judgment for the insurer.

Briefly the facts were these: On May 27, 1942 Charles M. Spyra, a serviceman, applied for a $1000.00 policy, which was issued and delivered, effective July 1, 1942. He made an allotment authorizing the army finance officer to deduct an amount monthly from his pay to be remitted didectly to the company as payment of premiums. Spyra died December 18, 1947. He had been discharged from the army on April 20, 1943 but through error the army finance office was not notified of his discharge and continued to make monthly payments to the company until November, 1948. After the insured's death the overpayment of allotments was discovered. The army finance office demanded the refund of these erroneous payments and the company repaid to the United States all of such payments amounting to $279.18. The company then defended on the theory that the allotment payments were unauthorized, that the insured being discharged from the army without making any arrangements for the payment of his premiums voluntarily abondoned his contract of insurance and the policy lapsed, and was not in force at the date of death. Judgment was rendered in the trial court, denying plaintiff any recovery. On her appeal the Texas Court of Civil Appeals reversed the judgment of the trial court and rendered judgment for the beneficiary-appellee, holding, in part, as follows:

"* * * Everything was done which was necessary to keep this insurance policy in effect during the life of insured, and therefore upon his death his beneficiary was entitled to face value of the policy. Appellee insurance company was not in any way a party to the arrangement made between the insured and the Army Finance Office to have these preiums paid. The payments were made and accepted by appellee until after the death of insured, and thereby the insurance policy was kept in effect during the lifetime of the insured. The fact that if the Finance Office had been notified of insured's discharge from the army it would not have continued to make these payments is no concern of the insurance company. The insurance company timely received and accepted each and every monthly payment during the life of insured and it is not now in a position to contend that the policy is not in effect because the Army Finance Office should not have made the payments. The contract between insured and the Army Finance Office was a matter entirely between these parties."

Effect of Korean Hostilities on Exclusive Words "War Declared or Undeclared" in Disability and Double Indemnity Riders

Apart from the question of including, or not including, war clauses in currently issued life insurance policies, your committee has encountered a somewhat perplexing problem involving previously issued policies containing Total Disability and Double Indemnity clauses excluding or terminating coverage where the insured engages in the "military, naval, aviation or relief service of any nation at war, declared or undeclared." The United Nations has termed the Korean hostilities a police action. No formal declaration of war is involved, yet for all practical purposes a state of war exists and United Nations armed forces are engaged in combat. No territory or possessions of the United Sates have been attacked by the aggressor, yet the United States armed services comprise by far the bulk of the forces committed in action. Your committee has not found, nor has its attention been directed to any decision passing on the question of whether this so-called "police action" constitutes war or a state of war. In the absence of any such current authority, it is felt that decisions passing on that question as related to World War II furnish a fairly safe guidepost. It will be remembered that under cases such as *New York Life Ins. Co. v. Bennion,* 158 Fed. (2) 260, (C.C.A. 10) it was held that the Japanese attack on Pearl Harbor was sufficient to constitute a state of war without a formal declaration of war by Congress, and that the death of a naval officer in the Pearl Harbor attack was excluded from the coverage of a double indemnity provision of a life policy excluding death resulting from "war or any act incident thereto." In other words, when the shooting starts, a state of war exists whether Congress has so declared or not. As a corollary, when the shooting stopped —when there was a "cessation of hostilities" on VE Day in Europe, a state of war, for practical purposes, ceased to exist although the war had not terminated in a political sense. Such was the holding in *Stinson v. New York Life Ins. Co.,* 167 Fed. (2) 233 (C.C.A.-D.C.) involving an insured who was fatally injured when he fell from a hotel window in France in October, 1945 while serving with the occupational forces. There the policy provided for a restricted recovery while the insured was "in the military or naval forces of any country engaged in war." A judgment denying recovery to the beneficiary of the full amount of the policy was reversed on the theory that at the time of the insured's death the United States was not engaged in war and the restrictive conditions of the policy did not apply.

In the absence of any controlling current authority, your Committee is of the opinion that the rules of interpretation laid down by the foregoing and like cases probably would govern on similar issues raised with respect to the Korean hostilities. In other words, when the shooting started in June, 1950, a state of war existed in a practical sense and will continue to exist so long as hostilities continue despite the lack of a formal declaration of war by the Congress.

A technical interpretation of this point occurred as this report was being written. An A.P. dispatch, dated May 10th from Tucson, Arizona, carried the story of a discharged marine veteran of the Korean action who was denied treatment in a Veterans Administration Hospital for a non service-connected disease because he was not a veteran of a "recognized war." VA authorities pointed out that under the present law a Korean combat veteran is in the same status as a soldier discharged in peacetime, and VA hospitalization is granted a "peacetime" veteran only for service-connected disability. VA authorities pointed out that "The law says that we will provide hospitalization for veterans of wars the United States has fought. Technically this man is not a veteran of a recognized war." As a matter of information, the United States Congress the following day broadened and passed legislation giving Korean veterans the same medical benefits as survivors of other wars.

A further interesting question in this regard is whether the United States presently is "a nation at war." Strictly speaking the fight against aggression in Korea is a United Nations operation and the forces operating there are under United Nations command and direction. The United States as such is not individually involved. However, the United Nations is a combination of individual nations operating in concert, and it is presumed that a

strict interpretation would hold that the United States, as one of those jointly operating individual nations, is in a technical sense a nation at war.

Miscellaneous Decisions in the Life Insurance Field

The following cases have been selected from among those submitted to your Committee as having particular or general interest to counsel engaged in this field of the law:

Although decided in November 1949, the case of *New York Life Insurance Company vs. Wilson,* 178 Fed. (2) 534 (9th Cir.), is of interest as indicating the continued willingness of the courts entirely to disregard policy verbiage in order to permit recovery of double indemnity benefits where the question is whether death resulted directly or indirectly from infirmity of mind or body, from illness or disease, etc. A strong dissenting opinion was written by Judge Pope which soundly points out the fallacy of the majority opinion which permitted recovery notwithstanding the medical testimony positively disclosed that a contributing cause to insured's death was an embolism. The court reasoned that the evidence was sufficient for the jury because some of the doctors testified that they "would not call it a disease." However, all of the doctors pronounced the thrombosis which had existed for some time prior to the insured's death a "bodily infirmity." The following language of Judge Pope points up the utter unsoundness of the conclusion reached in the majority opinion:

> "The exclusion clause, quoted at length in the majority opinion, provided that: 'Double indemnity shall not be payable if the insured's death resulted . . . directly or indirectly, from infirmity of mind or body, from illness or disease, or from any bacterial infection . . . ' etc.
>
> "In passing upon the effect of this clause, the court devoted itself to a review of the evidence as to the old adhesion in the bowel which made the fibrous ring which caused the bowel obstruction which resulted in death. It was pointed out that the medical testimony was that some of the doctors 'would not call it disease.' It was because there was at least a conflict of evidence upon this point that the court arrived at its conclusion that the verdict for plaintiff might stand.
>
> "Here, the exclusionary clause is broader—it uses the words 'infirmity of mind or body' as well as 'illness or disease.' And here there is no conflict or doubt whatever in or about the medical testimony—both doctors pronounced the thrombosis which resulted from the old operation a 'bodily infirmity.' Thus the condition is within the precise terms of the excepting clause, and there is no testimony to the contrary.
>
> "It cannot be said that these doctors did not choose their words carefully, because their description of the deceased's condition shows that its characteristics were such as must have been contemplated by the term 'infirmity of body' as used in the policy, whether those terms be judged by medical, or lay, or any other standards."

A like unsound opinion, wherein recovery of disability benefits was permitted, is found in the case of *Hughes v. The Mutual Life Insurance Company of New York,* 180 Fed. (2) 542 (9th Cir.). The holding in this case shows the continued willingness of the courts to disregard contractual verbiage. Here the record showed that the insured's income while pursuing the same occupation he had followed before the onset of his arthritic condition, to-wit, farm management, had increased during the years in question from $16,000.00 to $19,000.00 a year. While the evidence showed that the insured did not do the manual farm labor he did prior to the onset of the claimed disabling disease, the evidence clearly showed that he did do the work which was required to actively manage its operation and, in addition, that he also managed and supervised a forty-acre farm of a non-resident sister. The evidence also showed that the insured had, in fact, increased his own acreage of farm land as well as the size of his dairy herd. A strong dissenting opinion was filed by Judge Hall.

A case of importance on the question of reinstatement of a policy is *Schiel v. New York Life Ins. Co.,* 178 Fed. (2) 729 (9th Cir.), the holding of which is in substance as follows:

> "Reinstatement of Policy — Aviation Clause Included.— The policy involved in the litigation was issued to the insured and allowed to lapse for nonpayment of premiums. Three years later the insurer allowed the policy to be reinstated upon

condition that the double indemnity provision be omitted and that there be inserted an aviation clause. The original policy was free of conditions pertaining to any legitimate occupation whether in connection with the armed services or otherwise. The aviation clause which the insurer imposed on reinstatement of the ordinary life coverage nullified the occupation clause. Under guise of reinstatement the insurer undertook to rewrite the contract in such a fashion as to repudiate a risk assumed at the outset. Therefore, the judgment ordering reformation was reversed and the cause remanded."

Of particular interest to attorneys who are confronted with the bothersome question of "accidental means" is the case of *Bearman v. Prudential Ins. Co. of America*, 186 Fed. (2) 662 (C.C.A. 10). In this case the court, by unanimous opinion, affirmed the holding of the District Court that the evidence was insufficient to take the case to the jury.

The question was whether an injury which the insured received while he was engaged in removing the dome from a furnace, at which time he struck his back on some object, caused his death. The court held that testimony to the effect that the accident or injury "might have or could have caused the death of insured" was insufficient to take the case to the jury, because such testimony left the issue in the field of conjecture.

The following statement, and particularly the portion underscored is, I believe, of real importance to the trial attorney (p. 665):

"Whether there was causal connection between the accident and resulting injury and the atherosclerosis, the rupture of the atheromatous abscess, the thrombosis or the coronary occlusion presented a question for solution not within the competency of laymen, and a question with respect to which, only a medical expert with training, skill and experience could form a considered judgment and express an intelligent opinion. *Indeed, it perhaps would require a medical expert trained and experienced in a specialized field.*"

II.

Legislation Relating to Life Insurance

As this report is being compiled many legislatures are still in session. Consequently some difficulty has been experienced in obtaining in those jurisdictions information as to measures affecting life insurance. This section of your Committee's report dealing with legislation has been compiled primarily from reports of such matters submitted by Committee Members for their respective states with supplementing information on other states by the Chairman where it was obtainable. Quite generally found in many states are proposals or enactments broadening the investment powers of life companies with respect to investments in securities, largely local in nature. Your Committee found so many of these proposals varying in substance from locality to locality that no attempt was made to summarize them. Omitted from this report are states where no proposals or enactments of particular interest to life companies have been reported.

It is hoped that this legislative report will be of some assistance to the membership, bearing in mind that there was not available to your Committee more accurate or up-to-date information with respect to many jurisdictions.

UNITED STATES CONGRESS

H. R. 1.—The conference report on H. R. 1 was adopted by the House and Senate and signed by the President. Under this enactment, a gratuitous indemnity of $10,000.00, less USGLI or NSLI carried, is payable in installments to beneficiaries of all persons dying in active service after June 27, 1950, or within 120 days after release therefrom. Provision is made for waiver of premiums during active service and 120 days thereafter, representing cost of pure insurance risk carried by USGLI or NSLI policyholders. Provision also is made for surrender for cash of such earlier forms of permanent plan government life insurance and the securing of new insurance on same plan and amount as previously held or reinstating surrendered policies upon payment of reserve and current monthly premium. Other provisions relate to the expiration of 5-Year Term policies, the issuance of Non-Participating NSLI to veterans with service-connected disability, and Non-Participating Renewable, Non-Convertible 5-Year Term policies to all other veterans entitled to the gratuity, without medical examination, upon application within 120 days from release from active service.

CALIFORNIA

H. 1276—is proposed and pending. This bill amends Sec. 1430 of the Probate Code to permit payment to the parent of a minor of money due the minor not in excess of $1000.00, instead of the present figure of $500.00, where the minor's estate does not exceed $1500.00.

FLORIDA

There is pending H. B. 287 authorizing the court or jury to assess as damages against the losing party a reasonable attorney's fee.

MASSACHUSETTS

S. 189–A savings bank life insurance proposal passed by both Houses.

MISSOURI

Legislature still in session. The following proposals of general interest are pending:

S. B. 8–Amends Retalitory Act. Sen. Comm. Sub., changing the provisions generally to those prevailing in most states, has passed the Senate and is pending in the House Ins. Comm.

S. B. 132—a measure applying to Missouri companies, would permit the facsimile signature and seal of the Superintendent of Insurance on registration certificates required on Missouri policies. This measure has passed the Senate and is pending in the House Ins. Comm.

S. B. 133—Also a measure applying to Missouri companies, amends the registered policy deposit law by permitting a valuation of bonds with a fixed term and rate of interest on an amortized basis rather than the market value. This measure is intended to bring the valuation of registered policy deposits in line with the general bond valuation statutes. It has passed the Senate and also is pending in the House Ins. Comm.

S. B. 157—regulating insurance agents—is still pending in the Senate Comm. It departs somewhat freely from the N.A.L.U. recommended bill and has generated some opposition.

S. B. 166—amending the premium tax act and specifying additional deductions from such taxes—was amended to rewrite the bill and provides expressly for no deduction of refunded annuity considerations or discounts on industrial premiums. The bill as amended was ordered perfected by the Senate May 2, 1951. Strong possibility of a compromise amendment permitting those deductions.

H. B. 343—amends the Missouri Suicide Statute to provide generally that it shall not apply to policies insuring against death by accidental means, nor to those parts of life insurance policies insuring against death by accidental means. This measure was killed in the House Ins. Comm. on May 15th.

NEBRASKA

L. B. 341—repeals the requirement for medical examination of an applicant for more than $5000.00 life insurance. This measure approved March 26, 1951.

L. B. 457 — amends the incontestable clause as to war hazard exclusion substituting for the present exception in the incontestable statute, a permissible exception of "death resulting from war or acts of war, declared or undeclared, where such limitations shall have been found by the Director of Insurance to be in keeping with the interests of the stockholders of the company and to be not unfairly discriminating." At last reports this measure was still pending.

NEW YORK

Ch. 400—liberalizes investment law. Permits investment in common stocks which meet stated requirements up to 3% of admitted assets, or 1/3 of surplus, whichever is less, with no more than 2% of common stock of any one corporation to be held. Earnings requirements for corporate obligations less stringent; permits loaning on leasehold mortgages, and permits investment in corporations acquiring income-producing property. Effective March 31, 1951.

Ch. 95—requires the sending of nonforfeiture valuation notices in the case of monthly premium ordinary life policies for which premium notices are not sent. Effective September 1, 1951.

Ch. 728—reenacts state Soliders' and Sailors' Civil Relief Act with substantially

same provisions in force during World War II. Effective April 11, 1951.

Ch. 730—Revises statute on war clauses to make it follow N.A.I.C. statement of principles, adding a statement of legislative intent to prohibit clauses excluding deaths due to diseases or accidents not attributable to special hazards of war service. Effective April 11, 1951.

NORTH CAROLINA

S. 380—Amends the Insurance Code extending prohibition against discrimination and rebating; equalizes the "free surplus" required of foreign and domestic companies; limits to 20% any investment in the stock of corporations not engaged solely in insurance; and clarifies the law on service of process. This measure was enacted and is now law.

OHIO

S. 209—a measure relating to the valuation of securities was reported favorably out of committee. No other information.

H. B. 302—relating to unfair practices in the business of insurance probably will die in committee.

H. B. 337—fixing minimum premium which may be charged for group insurance has passed the House and probably will pass the Senate.

H. B. 464—which will empower minors 15 years of age or over to contract for insurance, has passed the House and likely will pass in the Senate.

OKLAHOMA

H. B. 90—permits mortgage loans by domestic insurers up to 60% (instead of 50%) of fair market value of real property, and adds permission for GI and certain leasehold mortgages. Enacted and approved by the Governor.

H. B. 150—permits foreign and domestic insurers to invest in Oklahoma industrial real property for income-producing purposes, as prescribed. Enacted and approved by the Governor.

SOUTH CAROLINA

H. B. 1396—permits guardian of a minor to invest in endowment or educational policies, to mature on or before 21st birthday. At last reports this measure was still pending in the Senate.

S. B. 186—would allow South Carolina courts in contract actions to assess as costs against losing party reasonable attorneys' fees for prevailing party. Measure still in Judiciary Committee.

S. B. 195—would amend the 1947 Insurance Code in several important respects: (1) would exclude annuity considerations and dividends credited to policyholders from premium tax; (2) provides tax-reducing investments in South Carolina securities; (3) would require filing of group premium rates, and other requirements for group underwriting. In Insurance Committee.

SOUTH DAKOTA

Legislature adjourned March 2, 1951.

S. 223—reducing the premium tax on domestic companies to ½ of 1% retaining 2½% rate on foreign companies. This measure deletes the provision for tax-reducing investments, but permits deduction of returned annuity considerations and termination allowance on group annuities. Became a law without approval February 24, 1951, effective July 1, 1951.

TENNESSEE

S. 284—Agents' qualifications law. Modeled on N.A.L.U. bill but includes accident and health as well as life insurance agents. Measure becomes a law, effective June 3, 1951.

H. 309—permits acquisition of stock of another insurance company if such acquisition does not substantially lessen competition, or restrain commerce, or create monopoly. Approved March 2, 1951 and became a law effective immediately.

TEXAS

S. B. 58—rewrites the present Texas insurable interest statute to conform to modern legal interpretation of that term as applied in other jurisdictions. It provides also an insurable interest to an individual employer in the life of any employee; that an employee shall have an insurable interest in the life of his employer, and that a stockholder of a closed corporation shall

have an insurable interest in other stockholders therein. Excepted from the proposal is any designation as beneficiary or assignee of a person, partnership, association, corporation or entity engaged in the business of burying the dead, or a trustee or proxy thereof. A companion bill, H. 173, relating to insurable interest and assignments has passed the House.

S. 74—a simultaneous death act, has passed the Senate. It differs somewhat from the model uniform measure. This is a companion bill to H. B. 28 covering the same subject.

S. 236—is a recodification of the insurance laws doing away with obsolete and overlapping laws but no substantive change in existing laws. This measure has passed the Senate. This is a companion measure to H. 652 now pending in the House Ins. Comm.

H. 285—is an omnibus tax bill. A conference substitute provides an across the board 10% increase for all businesses encompassed in the Act. Efforts to exclude life insurance companies has not so far been successful. This measure has passed the House and seems certain of passage. Life Insurance Associations are reported sponsoring separate industry measures covering domestic and foreign companies. These measures would accept the increased 10% for this year but would remove life insurance companies from the omnibus bill mentioned above. These measures will require four-fifths vote and passage seems somewhat doubtful.

WEST VIRGINIA

New Laws enacted.

H. B. 222—eliminates restrictions on sale of group life, and provides that despite prohibition against discrimination in rates, group life may be sold in manner provided by Eng. H. B. 240.

H. B. 226—prohibits newspapers and radio stations from accepting advertising from insurance companies not licensed in the state, and prescribes penalties.

H. B. 227—"Unauthorized Insurers Service of Process Act" provides for service of process against unauthorized companies doing business in state by serving notice upon the auditor, who may serve valid notice of such suit against the unauthorized company by registered mail.

H. B. 232—provides approval of Insurance Commissioner on all forms of life insurance policies to be sold in the state.

H. B. 236—establishes the right of an insured's heirs to the proceeds of a life policy where the beneficiary under such policy predeceases the insured.

WISCONSIN

S. B. 582—now pending in the Senate Comm. would authorize fiduciaries to retain, with the approval of the court, life and health and accident policies.

WYOMING

Legislature adjourned February 17, 1951. Among the enactments is H. 153, which amends the statute prescribing required policy provisions by providing that reinstatement of a policy shall be incontestable after the same period which governs incontestability of the original policy.

Respectfully submitted,

Jos. R. Stewart, Chairman
Byron E. Ford, Vice Chairman
R. W. Shackleford, Vice Chairman
R. F. Baird
Harold A. Bateman
E. D. Bronson
Frank M. Cobourn
Arthur Crownover, Jr.
T. DeWitt Dodson
William J. Eggenberger
Joseph W. Henderson
David J. Kadyk
Powell B. McHaney
Julius C. Smith
P. L. Thornbury
Price H. Topping
W. Calvin Wells, III
J. A. Gooch, Ex-Officio

Report of the Malpractice Committee

THIS committee first came into being upon its formation by president-elect, Wayne Stichter, and held its organizational meeting of members at the annual convention in 1950. At that time a discussion was had relative to the subject matter of the report to be made by the committee.

After considerable discussion among the members it was decided to make the first report of this committee somewhat general in scope due to the size of the subject matter and the fact that no previous reports have been rendered to this association by a committee on this subject. In working on this report the members of the committee are cognizant of the many interesting subjects, each of which could well be the basis of a report in itself. It had been hoped to center this report on the subject matter of LAWYERS' MALPRACTICE, but an inquiry into this field disclosed very few reported cases upon that question. Another interesting subject suggested was the field of contractually limiting a hospital from liability, for malpractice or negligence through the use of admission cards. These two subjects are mentioned only to suggest that future reports might well embrace a study of either of these propositions.

Our committee through the helpful work and research of each of its members has produced the following summarization which purports to call attention to significant cases that have been decided by courts of last resort throughout the United States during the past two-year period in the field of malpractice in relation to hospitals, physicians and lawyers. It is recognized that a report of this scope must necessarily be somewhat selective and consequently incomplete. However, an attempt has been made to cite all cases bearing upon these subjects that appeared to be helpful in making this report as comprehensive as possible. It is hoped that this generalization of these three fields of malpractice law will form the basis of particular subjects of inquiry for future study by this committee.

All of the members of the committee are of the definite feeling that there is a strong need for an active functioning committee on malpractice in this association and have mutually enjoyed working on the current report herewith submitted.

Malpractice In Relation To Hospitals

A hospital is only required to use ordinary and reasonable care and diligence in the treatment and care of patients. The degree of care required is in proportion to the known physical and mental condition of the patient. Thus, where a patient is delirious[1] or intoxicated,[2] it becomes the duty of the hospital to take such reasonable steps as may be necessary to prevent such patient from injuring himself; so, in a case where a pot of hot tea and a cup were placed on the bedside table of a patient who was under sedatives and no drinking tube was furnished the patient, the hospital was held liable for burns resulting from the attempt of the patient to drink the tea from the cup;[3] in failure to install sideboards on patient's bed in accordance with directions of attending physicians was negligence.[4] Injuries received by patients of mental hospitals are determined by establishing knowledge that the danger was reasonably foreseeable.[5] In a State hospital where the State furnishes the treatment by officers and employees of the State, the State is liable for failure to furnish adequate attention.[6]

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[1] *Hayhurst v. Boyd Hospital*, 254 Pac. 528; 43 Idaho 661.

Maki v. Murray Hospital, 7 Pac. 2d 228; 91 Mont. 251.

Bellondi v. Park Sanitarium, 6 Pac. 2d 508; 214 Cal. 472.

Spivey v. St. Thomas Hospital, 211 S. W. (2) 450*.

Santos v. Unity Hospital, Court of Appeals of New York (July 1950) 301 N. Y. 153, 93 N. E. 2d 574*.

[2] *Wood v. Samaritan Institute*, 161 Pac. 2d 556; 26 Cal. 2d 847.

[3] *Rice v. California Lutheran Hospital*, 163 Pac. 2d 866; 27 Cal. 2d 296.

Flower Hospital v. Hart, 62 Pac. 2d 1248 (Okla.)

Christian v. Galutia, 236 S. W. 2d 177*.

[4] *Gordon v. Harbor Hospital, Inc.*, Supreme Court, Appellate Div. 2d Dept. N. Y. Oct. 1949.

[5] *Di Fiore v. State*, Supreme Court, Appellate Div. 3rd Dept. (May 1949); 88 N. Y. S. 2d 815, 275 App. Div. 885.

Kubas v. State, Court of Claims of New York (Oct. 1949) 198 Misc. 130, 96 N. Y. S. 2d 408.

McPortland v. State, Supreme Court, Appellate Div. 3d Dept. (June 1950) 277 App. Div. 103.

[6] *Schmid v. Werner et al*, Supreme Court, App. Div. 1st Dept. (Nov. 1950) 277 App. Div. 520, 100 N. Y. S. 2d 860*.

Kaplan v. State, Supreme Court, App. Div. 3rd Dept. (Nov. 1950) 277 App. Div. 1065, 100 N. Y. S. 2d 693.

Equipment

Equipment furnished by a hospital for a patient's use should be reasonably fit for the uses and purposes of its intended use,[7] and a patient may recover for injuries proximately caused from defective equipment furnished by the hospital.[8] The burden is on the plaintiff to show by competent evidence the fact that the equipment be defective.[9] However, where equipment is furnished which is obviously unfit for the use intended but, nevertheless, is used by the patient's private nurse, the hospital will not be liable for injuries resulting from its use.[10]

Liability Under Doctrine Of Respondeat Superior

In most jurisdictions it is held that a hospital is liable under the doctrine of *respondeat superior* for the negligence of its professional staff employed by the hospital. Thus, it has been held that a plaintiff may recover for injuries caused by the negligence of a student practitioner rendering treatment in a clinic conducted by the institution;[11] by the application of a corrosive liquid applied to the arm of a patient by a technician conducting an allergy test,[12] or for burns occasioned by a nurse in the use of hot water bottles,[13] or in failing to treat such burns after they occurred.[14] However, a nurse acting under direction of the physician, constitutes medical failure rather than administrative failure when negligent, for which the hospital is not held liable.[15]

[7]*Guilliams v. Hollywood Hospital*, 114 Pac. 2d 1; 18 Cal. 2d 97.

[8]*Flower Hospital v. Hart, Supra.*

Baker v. Board of Trustees, etc., 23 Pac. 2d 1071; 2 Cal. App. 243.

Kress v. City of Newark, 74 A 2d 902 (N. J. Super. Ct., App. Div., 1950) *

[9]*Brown v. Shannon West Texas Memorial Hospital*, 222 S. W. (2) 248.

[10]*Payne v. Santa Barbara Hospital*, 37 Pac. 2d 1061; 2 Cal. App. 220.

[11]*Carver Chiropractic College v. Armstrong*, 229 Pac. 641; 103 Okla. 123.

Inderbritzen v. Lane Hospital, 12 Pac. 2d 794; 124 Cal. App. 462.

[12]*Hedlund v. Sutter Medical Service*, 124 Pac. 2d 878; 51 Cal. App. 2d 327.

[13]*England v. Good Samaritan Hospital*, 70 Pac. 2d 692; 22 Cal. App. 2d 226.

Flower Hospital v. Hart, Supra.

[14]*Corey v. Beck*, 72 Pac. 2d 856 (Idaho).

*Indicates cases are discussed in Appendix.

[15]*Wisner v. Syracuse Memorial Hospital.* Supreme Court, Appellate Division, 4th Dept. (June, 1949), 274 App. Div. 1087, 86 N. Y. S. 2d 150*.

McGuinn, et al. v. Knickerbocker Hospital. Supreme Court, Trial Term, New York County, Part XI (April, 1949) 89 N. Y. S. 2d. 32*.

Bakal v. University Heights Sanitarium, Inc. et al. Supreme Court, Appellate Division, First Department (Dec. 1950), 277 App. Div. 572, 101 N. Y. S. 2d 385*.

Res Ipsa Loquitur

Where a patient is delirious, unconscious or under anesthesia, so that he has no knowledge of how an injury was sustained, and the injury is of such character that it would not ordinarily occur if due care in the patient's treatment had been used, the doctrine of *res ipsa loquitur* applies.[16] No attempt has been made herein to discuss the various questions raised by cases involving eleemosynary institutions and their liability as such due to the fact that numerous states have covered this situation by statutory provision.

Malpractice In Relation To Physicians

The cases do not distinguish between dentists and physicians as to neglect. The standard of care required of each is the same.

There are three main classes of cases in which malpractice has been charged:[17] (1) those charging unskillfulness in diagnosis, (2) those charging unskillfulness in selection of method of treatment, and (3) those charging unskillfulness in some act or omission in administering treatment.

Diagnosis:

In the absence of a showing of lack of ordinary skill and care, failure to make a correct diagnosis does not constitute malpractice.[18] " . . . diagnosis terminates only when the physician learns, at least to his own satisfaction, the method of the ailment,"[19] and failure of the patient to recover creates no inference of incorrect diagnosis.[20] But lack of care in diagnosis will

[16]*Ybarra v. Spangard*, 154 Pac. 2d 687; 25 Cal. 486; 208 Pac. 2d 445.

Maki v. Murray Hospital, 7 Pac. 2d 228 (Montana).

General Benevolent Association v. Power 50 Southern 2d, 127 (Miss.) *

*Indicates cases are discussed in Appendix.

[17]*Callahan v. Hahnemann Hospital*, 35 Pac. 2d. 536, 541 (Cal.).

White v. Moore, 62 S. E. 2d 122 (W. Va., decided September 26, 1950) *.

[18]*Lawless v. Callaway*, 147 Pac. 2d 604, 606 (Cal.)

McBride v. Ray, 58 Pac. 2d 886 (Okla.)

Petticord v. Lieser, 105 Pac. 2d 5 (Wash.)

Simms v. Gafney Clinic and Hospital, 227 S. W. (2) 848*.

[19]*Reynolds v. Struble*, 18 Pac. 2d 691, 694 (Cal.)

[20]*Abos v. Martyn*, 88 Pac. 2d 797 (Cal.)

Phillips v. Stillwell, 99 Pac. 2d 104 (Ariz.)

Clemens v. Smith, 134 Pac. 2d 424 (Ore.)

constitute malpractice[21] and it is held failure to x-ray when patient complains of a broken needle in the arm will constitute malpractice.

Method of Treatment:

Malpractice is not established by showing that other medicines or a different method of treatment might have been employed.[22] If the method of treatment selected is approved by a respectable minority of physicians, a charge of malpractice cannot be based thereon.[23] Mere lack of a license does not establish malpractice. If an unlicensed practitioner exercises the requisite skill which is ordinarily employed by members of the medical profession under similar conditions he is not liable in damages.[24]

Negligent Act or Omission:

Whether a specific act or omission constitutes malpractice depends, generally speaking, upon the facts in any given case, the basic question being whether the practitioner has measured up to the standard of care required, which has been generally defined to be: "The degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same or similar locality."[25] However, in recent decisions the Supreme Court of California seems to have broadened the above definition by holding that under modern conditions the test is "the same or similar circumstances" rather than "the same locality."[26]

Expert Testimony

The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts and can only be proved by their testimony,[27] unless the conduct required by the particular circumstances is within the common knowledge of the layman.[28] Such testimony is conclusive to the extent that it may not be contradicted by the testimony of a non-expert witness.[29]

As to the qualifications of an expert, difficulty has been encountered in stating the general rule by which to measure the qualifications of a physician to testify on the issue of the standard of care.[30] It is generally stated that, to qualify as an expert in a malpractice case, the witness must show himself to possess learning and knowledge of the subject of inquiry sufficient to qualify him to speak with authority on the subject, plus a familiarity with the treatment and degree of skill of other practitioners in the locality sufficient to qualify him to say whether defendant's treatment was consistent with what other physicians, in the exercise of reasonable care, might do under similar circumstances.[31]

The rule is clearly stated in *Sinz v. Owens,* supra, 205 Pac. 2d 35 (Cal.).

The qualifications of a medical expert to testify in a malpractice action as to the standard of medical treatment is a question for the sound discretion of the trial court and its ruling will not be disturbed on appeal in the absence of an abuse of discretion.[32]

Methods of Proof

Actions in which recovery for malpractice has been allowed fall into four general classifications: (1) negligence established by expert testimony, (2) negligence established by the absence of expert testimony, (3) negligence established by *res ipsa loquitur,* and (4) negligence established by expert testimony of the defendant.

Cases Requiring Expert Testimony:

Expert testimony has been held necessary to warrant a recovery following the

[21] *Wilson v. Corbin,* 41 N. W. 2d 702*.
Gresham v. Ford, 18 Neg. Cases, 149.
*Indicates cases are discussed in Appendix.
[22] *Jensen v. Findley,* 62 Pac. 2d 431, 434 (Cal.)
Walkenhorst v. Kesler, 67 Pac. 2d 654 (Utah).
[23] *Simms v. Weeks,* 45 Pac. 2d 350, 355 (Cal.)
Gross v. Partlow, 68 Pac. 2d 1034 (Wash.)
[24] *Grier v. Phillips,* 230 N. C. 672, 55 S. E. 2d 485*.
Andrews v. Lofton, 80 Ga. App. 723, 57 S. E. 2d 338*.
[25] *Trindle v. Wheeler,* 143 Pac. 2d 932, 933 (Cal.)
Boyce v. Brown, 77 Pac. 2d 455 (Ariz.)
Clemens v. Smith, Supra, Ore.
Peterson v. Hunt, 84 Pac. 2d 999 (Wash.)
[26] *Sinz v. Owens,* 205 Pac. 2d 35 (Cal.)*
Moore v. Belt, 212 Pac. 2d 509 (Cal.)
*Indicates cases are discussed in Appendix.
[27] *Trindle v. Wheeler, Supra.*
Facer v. Lewis, 326 Mich. 702, 40 N. W. 2d, 457*.

[28] *Engleking v. Carlson,* 88 Pac. 2d 695.
[29] *Engleking v. Carlson, Supra.*
Arais v. Kalensnikoff, 74 Pac. 2d 1043.
[30] *Sinz v. Owens, Supra* (Cal.)*
Rice v. Tissaw, 112 Pac. 2d 866 (Ariz.)
[31] *McGulpin v. Bessmer* (Iowa), 43 N. W. 2d, 121*.
Morrill v. Komasinski, 256 Wis. 417, 41 N. W. 2d 620*.
[32] *People v. Pac. Gas and Elec. Co.,* 81 Pac. 2d 584 (Cal.)
City etc. of Denver v. Lytell, 103 Pac. 2d 1 (Colo.)
Meyers v. Shell Petroleum Co., 110 Pac. 2d 810 (Kan.)
Kenn v. Margolin, 101 Pac. 2d 818 (Okla.)
Oyster v. Dye, 110 Pac. 2d 863 (Wash.)
*Indicates cases are discussed in Appendix.

extraction of a tooth,[32] a charge of negligence in diagnosis or treatment,[34] leaving a patient suffering from infantile paralysis in a cast for an excessive length of time,[35] removal of tonsils and sixteen teeth in the same operation,[36] where an incision was claimed to have been too long and in an improper place,[37] and alleged negligence in giving an anesthetic to an intoxicated person.[38]

Recovery Permitted Without Expert Testimony:

No sharp distinction exists between cases where recovery has been permitted without expert testimony and cases applying the *res ipsa loquitur* doctrine. Where there was evidence that the defendant dentist failed to sterilize the gum or hypodermic needle in the extraction of a tooth, the court, in reversing the judgment of nonsuit, took judicial notice of the necessity to use ordinary care to procure sterilization, saying: "The result of a nonsterile condition is a matter of common knowledge. . . ."[39] Recovery was permitted where the patient, undergoing therapeutic treatment, was injured by the explosion of a lamp bulb not protected by a screen,[40] and recovery was allowed for a patient for injury resulting from diathermy treatment.[41]

Res Ipsa Loquitur Doctrine

In most jurisdictions the *res ipsa loquitur* doctrine is applicable and has been applied in a variety of malpractice cases, such as leaving a sponge or other foreign substance in the body of the patient,[42] where a bad result in reducing a fractured arm was obvious to a lay person,[43] an injury to a healthy portion of a patient's body outside the field of operation,[44] failure to use an opthalmoscope where the patient complained of a foreign substance in the eye.[45] On the other hand, it has been held that an incorrect diagnosis of a foreign body in the eye affords no basis for the application of the doctrine.[46] The doctrine has been held to apply in the case of a dentist in penetrating the tongue of a patient with a drill.[47] In the failure of a dentist to remove remnants of bone from plaintiff's jaw after extraction.[48] The doctrine has been held not applicable in the case of treatment for a condition of varicose veins where amputations are later found necessary.[49] Where the doctrine is applicable, it becomes incumbent on the defendant to rebut the *prima facie* case created by the application of the doctrine.[50]

Bad Results

A bad result following surgery or treatment, in and of itself, is not evidence of negligence nor does it warrant the application of the *res ipsa* doctrine.[51]

Agency

Where a physician is not negligent, but an intern or nurse acting as the employee of a hospital is negligent, the physician is not liable.[52]

Malpractice Action No Bar To Contract Action

Where a patient has a cause of action for breach of contract for failure to obtain the desired result, the same does not bar a separate action for alleged malpractice, the two causes of action being dissimilar as to theory, proof and damages recoverable.[53]

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[33] *Rising v. Veatch*, 3 Pac. 2d 1023 (Cal.)
[34] *McGraw v. Karr*, 128 Pac. 870 (Colo.)
[35] *Crouch v. Wychoff*, 107 Pac. 2d 339, (Wash.)
[36] *Brown v. Hughes*, 30 Pac. 2d 259 (Wash.)
[37] *Saylor v. Brady*, 220 Pac. 1047 (Kan.)
[38] *Laundon v. Scott*, 194 Pac. 488 (Mont.)
[39] *Mastro v. Kennedy*, 134 Pac. 2d 865, 867 (Cal.)
[40] *Crause v. McBride*, 153 Pac. 2d 727 (Cal.)
[41] *Wood v. Miller*, 76 Pac. 2d 963 (Ore.)
[42] *Alleys v. Ryan*, 64 Pac. 2d 409 (Cal.)
Ely v. Johnson, 17 Neg. Cases, 527 (CCH).
Carruthers v. Phillips, 131 Pac. 2d 193, (Ore.)
Wharton v. Warner, 135 Pac. 235 (Wash.)
Reinhold v. Spencer, 26 Pac. 2d 796 (Idaho).
[43] *Olsen v. Weitz*, 221 Pac. 2d 537 (Wash.)
[44] *Ybarra v. Spangard*, 154 Pac. 2d 687 (Cal.)
Vanault v. O'Rourke, 33 Pac. 2d 535 (Mont.)
[46] *Lippold v. Kidd*, 259 Pac. 210 (Ore.)
[46] *Adams v. Boyce*, 99 Pac. 2d 1044 (Cal.)
[47] *Mitchell v. Grigsby*, 18 Neg. Cases 848 (CCH).
[48] *Adams v. Heffington*, 226 S. W. (2) 352.
Giesenschlag ET UX v. Valenta, 225 S. W. (2) 914.
[49] *McGulpin v. Bessmer, Iowa*, 43 N. W. 2d, 121*.
[50] *Ybarra v. Spangard, Supra**.
[51] *Hollis v. Alquist*, 251 Pac. 2d 871 (Wash.)
Moulton v. Huckleberry, 46 Pac. 2d 589.
Donahoo v. Lovas, 288 Pac. 698 (Cal.)
Bunghardt v. Younger, 239 Pac. 469 (Okla.)
Wells v. McGehee, 39 Southern 2d, 196 (La.)*
McPeak v. Vanderbilt University Hospital, et al. 229 S. W. 2d, 150*.
[53] *Scacchi v. Montgomery*, 75 A 2d, 535 (Pa. Supr. Ct. 1950) *
Shull v. Schwartz, 73 A. 2d, 403 (Pa. Supr. Ct. 1950)*
McConnell v. Williams, 65 A. 2d, 243 (Pa. Supr. Ct., 1949) *
[52] *Colvin v. Smith*, Supreme Court, Appellate Division, Third Dept.
Bakal v. University Heights Sanitarium, 277 App. Div. 572, 101 N. Y. S. 2d, 385.
Schmid v. Werner, et al, 277 App. Div., 520, 100 N. Y. S. 2d, 860.

Respondeat Superior

Where a physician acknowledges the acts of his assistant, liability results by invocation of the doctrine of *Respondeat Superior.*[54]

Negligence Established By Testimony of the Defendant

Where a statute permits a party to an action to call his adversary as a witness for the purpose of cross-examination, negligence may be proved by the testimony elicited. Negligence may likewise be established by extra-judicial statements of the defendant.[55]

Errors of Judgment

A physician or surgeon is not liable for an honest mistake of judgment providing he possesses and uses the skill and care required in formulating his judgment.[56]

Lawyers Malpractice

The only cases of any significance reported during the last two-year period upon the subject of LAWYER MALPRACTICE are briefly summarized as follows:

Gimbel v. Waldman, Supreme Court, Special Term, New York County, Part III (Nov. 1948) 193 Misc. 758, 84 N. Y. S. 2d 888. This suit was against a lawyer. The first cause of action was to recover damages for negligently and incompetently advising the plaintiff concerning various questions of law, particularly as to the validity of in *terrorem* clauses in wills, as a result of which she, as the purported wife of a decedent, accepted a settlement from the executors of the estate of the deceased in the sum of $25,000, in settlement of all her claims, whereas, it is alleged, but for such negligent and incompetent advice she would have received as her elective share pursuant to Section 18 of the Decedent Estate Law the sum of $45,045.86 and she claims damages in the sum of $20,045.86. The second cause of action is to recover the sum of $2,700 which she alleges she paid to the defendant for his fee, the basic ground being that by reason of such negligence and incompetence defendant was not entitled to receive any fee from the plaintiff.

The Court granted defendant's motion in the nature of a demurrer and dismissed both causes of action.

The Court's opinion cited with favor the rule of *Goodman and Mitchell v. Walker,* 30 Ala. 482, 496, 68 Am. Dec. 134, that if the law on the subject is well and clearly defined, has existed and been published long enough to justify the belief that it was known to the profession, "then a disregard of such rule by an attorney at law renders him accountable for the losses caused by such negligence or want of skill; negligence, if knowing the rule, he disregarded it; want of skill, if he was ignorant of the rule." The Court held that the determinations as to the validity of in *terrorem* clauses is in hopeless conflict in New York State, that the Court of Appeals has never directly spoken the final word and therefore the defendant attorney could not be liable as a matter of law if he had rendered the advice alleged in the complaint.

Haggerty v. Watson, et al, Supreme Court, Appellate Division, Second Department (May 1950) 277 App. Div. 789, 97 N. Y. S. 2d 318. Where there was no merit to any of the defenses which client claimed that his attorneys failed to interpose in action against client, client was not entitled to recover from attorneys for alleged breach of contract whereby they agreed to interpose those defenses, since damages suffered by client were not due to attorneys' alleged breach of contract.

General Acc. F. & L. Assur. Corp. v. Cosgrove, 257 Wis. 25, 42 N. W. 2d 155. An insurance company, the present plaintiff, retained an attorney, the defendant, to represent it in the defense of an action arising out of an automobile accident. A judgment was rendered against the insurance company. The attorney inadvertently failed to settle his bill of exceptions, thus failing to perfect his appeal of this judgment. The attorney admitted his malpractice, but denied that the insurance company had sustained damage thereby. The court held that the insurance company had the heavy burden of establishing by clear proof that it would have been successful in the prior action. Reviewing that prior judgment, the court ruled that the insurance company failed to prove to a reasonable certainty that it had been damaged.

Aiken v. Richardson, 80, Ga. App. 591, 56 S. E. 782, decided November 23, 1949. Client sued attorney charging failure to account for funds collected by attorney in settlement of personal injury claim of

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[54] *Heimlich v. Harvery,* 255 Wis. 471, 39 N. W. 2d, 394*.

[55] *Lashley v. Koerber,* 156 Pac. 2d, 441, 444, 445, (Cal.) *
Bowles v. Kinton, 263 Pac. 26 (Colo.)

[56] *Adams v. Boyce, Supra,* (Cal.)
McBride v. Ray, 58 Pac. 2d 886 (Okla.)
Guisti v. C. H. West & Co., 108 Pac. 1010 (Ore.)
Baker v. Wycoff, 79 Pac. 2d 77 (Utah).

client. Attorney demurred to complaint and decision of court turned upon technicalities of pleading with no discussion or decision on the question of legal malpractice.

Cain v. Tuten, 82 Ga. App. 102, 60 S. E. 2d 485, decided July 13, 1950. Client sued attorney for recovery of fees already allowed attorney by State Workmen's Compensation Fund and exemplary damages. Decision: Attorney's fee not earned until all proceeds of recovery turned over to client. Although award made by Compensation Commission was eventually paid to claimant through efforts of second attorney, complaint states a good cause of action but there can be no recovery for exemplary damages.

The two significant *syllabi* points of this case are as follows:

"2. *Attorney And Client—*
Where attorney agrees to perform services for a contingent fee, the happening of the contingency is a condition precedent to the right of attorney to recover for such services and the precise event which was contemplated must happen.

"6. *Damages—*
Exemplary damages are not recoverable in cases arising on contract. Ga. Code Ann. Sections 20-1405."

Bank of Mill Creek v. Elk Horn Coal Corp.; Allers et al. v. Elk Horn Coal Corp. et al. 57 S. E. 2d 736 (W. Va., decided February 14th, 1950).

"Where corporation held voting trust certificates as pledge to secure debts due from president to the corporation, it was duty of receivers upon appointment to see that pledged certificates upon default were sold for as high a price as possible, and it was duty of receivers' attorney to assist receivers in performing that duty . . . and when corporation's receivers sold them to representatives of receivers' attorneys whose real identity as purchasers was concealed from other stockholders and the court, transactions were voidable and would be set aside at suit of other stockholders, and receivers restored to rights they had prior to sale as pledgees notwithstanding payment of adequate consideration and good faith of attorneys in carrying out tacit agreement between debtor and themselves that they would succeed to control of corporation on his death."

Respectfully submitted,

CHARLES P. GOULD, *Chairman*
PHILIP C. STERRY, *Vice Chairman*
RAYMOND A. SCALLEN
WILLIAM F. MARTIN
WILLIAM A. KELLY
WILLIAM H. BENNETHUM
WILSON ANDERSON
MILTON A. ALBERT
KENNETH P. GRUBB
R. B. GRAVES

* * *

APPENDIX

Footnote 1. Spivey v. St. Thomas Hospital, 211 S. W. (2) 450. This was an action against the hospital arising out of the death of a paying patient who jumped from a window during delirium attending high fever. The court held in examining a verdict for the plaintiff that whether the defendant was negligent in failing to keep someone in the room to watch the patient in view of its actual knowledge of the danger from his condition and in leaving him unattended a few feet from an unfastened and unguarded window and also in failing to fasten restraints securely so that they would not come loose was for the jury. It was also held that a hospital operated as a charity is liable for the negligence of its servants in the same way as a private individual. The only immunity allowed a hospital conducted as a charity is that such of its property as is used exclusively for charitable purposes is exempt from execution under a judgment for tort. A verdict of $20,000 to the widow of the 26-year-old husband was held not to be excessive.

Footnote 1. Santos v. Unity Hospital, Court of Appeals of New York, July 1950, 301 N. Y. 153, 93 N. E. 2d 574. This was an action for wrongfully causing the death of the plaintiff's decedent who was killed when she fell out of a window of a labor room in the maternity division of the defendant's hospital. The fatal fall was brought about by a mental derangement called intrapartum psychosis—a condition that is recognized by the medical profession as a hazard of childbirth, though the incidence of the disorder may not be high.

The decedent had two previous normal pregnancies and was without any abnor-

mal symptoms while awaiting the delivery of her third child in the labor room. The sole nurse in charge had stepped just outside of the labor room and sight range of the decedent to answer the telephone when the decedent, apparently in the throes of a sudden and unanticipated psychosis, threw open the window of the labor room, unhooked the window screen and jumped or fell to her death. There was testimony for the plaintiff that at several Manhattan hospitals nursing attendance on patients in labor rooms is constant and uninterrupted. There was testimony for the defendant that intrapartum psychosis is so rare that three obstetricians in their combined experience of over 300,000 births had never seen a case, and in the defendant hospital, where more than 25,000 babies had been delivered, this was the first case of intrapartum psychosis. There was no proof of a custom or requirement to lock or bar labor room windows; in fact the evidence indicated absence of such a custom. It also was undisputed that decedent was the only patient in the labor room, that on order of her own physician she was walking about the labor room and that there was a qualified nurse assigned to the labor room.

Plaintiff claimed that the defendant hospital was negligent in not providing guardrails or locks for the labor room windows and in not providing uninterrupted attendance in the labor room. Plaintiff contended that the absence of the nurse from the labor room for any period of time was negligence.

In the Trial Term, the jury found for the plaintiff in the sum of $35,000 and the court entered judgment thereon. (*Flanagan v. Unity Hospital,* 194 Misc. 26, 87 N. Y. S. 2d 649). The Appellate Division, Second Department, set the verdict and judgment aside on the law and ordered a new trial on the ground that the issue of negligence with respect to not placing bars or locks on the windows was improperly submitted to the jury in the absence of proof of such a custom. However, the Appellate Division indicated that they thought that the defendant hospital was negligent in not providing uninterrupted attention.

Plaintiff stipulated for judgment absolute in event of affirmance and the Court of Appeals held that the case was properly submitted to the jury in that the jury was instructed to consider all of the evidence and that the matter of the absence of bars or locks from the labor room window was not submitted to the jury as negligence in and of itself.

Order of Appellate Division reversed and judgment of the trial term affirmed.

Footnote 3. Christian v. Galutia, 236 S. W. (2d) 177. The plaintiff contacted the defendant, a practicing physician and surgeon, in the latter part of 1947. She was about 32 years of age and had previously given birth to two children, only one of whom lived. She gave the appellant a complete history of her prior experiences at childbirth and related many statements made to her by previous doctors who had attended her. She entered the hospital on November 12. On November 16, she was placed under an anesthetic but was later returned to her room. The hospital records indicated that she was returned to the operating room in the evening where her physician decided to perform a Caesarean section.

The court, citing *Bowles v. Bourdon,* 219 S. W. (2) 779, stated that:

> "It is definitely settled with us that a patient has no cause of action against his doctor for malpractice either in diagnosis or recognized treatment, unless he proves by a doctor of the same school of practice as the defendant:
>
> (1) That the diagnosis or treatment complained of was such as to constitute negligence and that
>
> (2) That it was a proximate cause of the plaintiff's injuries."

It was held in this case that the plaintiff had presented no such proof and that the doctor's testimony exonerated him for any charges of negligence.

Footnote 6. Schmid v. Werner, et al. Supreme Court, Appellate Division, First Department (Nov. 1950) 277 App. Div. 520, 100 N. Y. S. 2d 860. Section 50-D of the General Municipal Law provides in part that a municipal corporation shall save harmless any physician rendering medical services gratuitously to a person in a public institution maintained by the public institution for damages for personal injuries alleged to have been sustained by reason of the malpractice of such physician. The *Schmid* case holds that the paid members of the house staff do not come within the protection of this Section. The judgment for the defendant, City of New York dismissing plaintiff's complaint was affirmed.

Footnote 8. Kress v. City of Newark, 74 A 2d, 902 (N. J. Super. Court, App. Div., 1950). This is the only case of interest within the prescribed period covering hospital malpractice. Although there are no new principles of law enunciated, the case is of interest factually and in its application of established canons. It does not appear from any specific findings of fact in the case but it must be assumed from the approach to the issues that the City of Newark owned and operated the hospital in question and that it was a charitable institution. The plaintiff was employed as an x-ray technician without having had any formal training whatever. Actually, she was first employed in the hospital as a maid and was later transferred to the x-ray department where she began by escorting patients from their rooms to the x-ray rooms. She continued this work until she was transferred to the dark room where she developed the x-ray plates. The time involved the war years and it was evidentally difficult to get trained technicians. The background of the plaintiff in her rise from ordinary hospital maid to x-ray technician is best explained by her own evaluation of her training, "so I went out and I was fixing the patients up for x-rays and I used to watch the technician what she did and you catch on after a while and so I went out and learned the x-rays and they put me out on the machines. . . . I had no training whatsoever."

The plaintiff worked in the x-ray department for a period of four to five years when a slight accident indicated a biopsy which resulted in a diagnosis of skin cancer due to undue exposure to x-ray. Surgery was resorted to and at the time of trial the entire surface of the hand down to the tendon sheath had been removed with the dismal prospect of amputation of the limb in the not too distant future.

The evidence was conflicting as to the kind of protective equipment afforded to plaintiff but it was undisputed that when she used the mobile x-ray unit, no lead screen was available. Standard practice called for a lead screen for the protection of the operator of any x-ray unit.

The complaint was bottomed on the failure of the defendant to provide a reasonably safe place to work and the trial court, for reasons not given in the reported case, dismissed the action.

The Superior Court, Appellate Division, in reversing the trial court said that the factual situation above related called for a decision by a jury to determine whether or not the plaintiff had sustained the burden of establishing defendant's negligence or was herself guilty of contributory negligence. It also held that if the plaintiff's story was believed by the jury, it constituted a wrongful act or positive misfeasance as distinguished from mere negligence and hence would not be relieved of liability because it was engaged in the performance of a governmental function.

An interesting side light of the case (at least from our approach) developed from the obvious contention that there was no cause of action because the hospital was a charitable institution. Not so, said the appellate division. No matter how applicable such principle of law might be as between the hospital and a patient, the latter of whom is the recipient of the bounty of the charity, it does not apply where a stranger or an employee is concerned. The plaintiff may have received an advantage in her employment but in return she gave them her services. That relationship had nothing to do with the lofty intentions of the donor of the charity.

Footnote 15. Wisner v. Syracuse Memorial Hospital. Supreme Court, Appellate Division, Fourth Department (June, 1949), 274 App. Div. 1087, 86 N. Y. S. 2d 150 and

Footnote 15. McGuinn, et al v. Knickerbocker Hospital, Supreme Court, Trial Term, New York County, Part XI (April 1949) 89 N. Y. S. 2d 32. The Court held in the *Wisner* case that where a nurse had used hot water bottles pursuant to direction of attending physician to apply external heat, failure of nurse to remove bottles upon complaint of patient constituted a medical failure for which the hospital was not liable rather than an administrative failure.

In the *McGuinn* case, the Court held that the application of a hot water bottle by a nurse in the treatment of a patient in shock was a medical as distinguished from an administrative act whether or not a physician directed the nurse to apply the bottle.

Footnote 15. Bakal v. University Heights Sanitarium, Inc., et al. Supreme Court, Appellate Division, First Department (Dec. 1950), 277 App. Div. 572, 101 N. Y. S. 2d 385. Before an operation on plaintiff, a negative plate, part of an electrocautery apparatus, was applied, under plaintiff's body by an unlicensed nurse of the defendant, a private hospital operated for

profit. The operating surgeon, also a defendant, was absent from the room at the time the plate was placed in position. The jury arrived at the special verdict that the injuries were caused by the cautery machine; that the machine was not properly applied to plaintiff's body; that the plate was placed by the nurse; that it was not incumbent upon the surgeon to supervise the placing of the plate; that the damages were $7,000.00.

The parties moved for direction of a verdict and the court dismissed the complaint against the defendant surgeon and directed judgment reduced to $5,000.00 in plaintiff's favor against the hospital. (198 Mis. 651, 99 N. Y. S. 2d 814).

The issue on appeal was whether defendant, a private hospital operated for profit, as distinguished from a charitable hospital, is responsible for its nurse's negligent acts, not administrative or clerical, but performed in relation to a patient's medical care in connection with an operation performed in the hospital by the patient's own surgeon. Judgment against the defendant hospital was reversed and the judgment in favor of the defendant surgeon was affirmed by the Appellate Division. The court held that a private hospital operated for profit, like a charitable hospital, is not liable for the professional acts of its nurses. The case has been appealed to the Court of Appeals.

Footnote 16. General Benevolent Association v. Power, 50 Southern 2d, 127 (Miss.) This case was an action by a hospital patient for damages for alleged negligence of the hospital nurses in breaking and leaving a piece of needle in the patient's arm with resulting infection. The defendant was the owner and operator of a private hospital operated for profit. The plaintiff while being treated for gastritis was given glucose injections. The injections were administered by nurses employed at the hospital. The day following the discharge of the patient from the hospital, the arm where the injections had been made was sore, swollen, and the patient suffered great pain. Four days later doctors removed a broken piece of hollow needle about one-half inch in length. The claim was made that the broken piece of needle found in the arm was not the gauge of needle used at the hospital for glucose injections. It was claimed that the needle of the gauge found was used for administering narcotics and other highly liquid substances, and by doctors who personally administered glucose to a child. Damages in the amount of $5,000 were awarded, and upon appeal the judgment was affirmed.

The court met the contention of the appellant that there was no direct testimony by an eyewitness of the breaking of the needle in appellee's arm by stating that the type of negligence claimed could not be proven ordinarily by direct evidence and that the circumstantial evidence in the case gave rise to inferences sufficient to justify a jury's finding of negligence. The court ruled that it was for the jury to determine whether or not inferences of negligence could be drawn from the circumstances proven, also as to the weight to be given to the testimony of appellee that she had had no previous or subsequent injections and the testimony relating to the disparity in the size of the needles, etc.

Footnote 17. White v. Moore, 62 S. E. 2d 122 (W. Va., decided September 26, 1950). This was an action by administrator for wrongful death resulting from alleged negligence and lack of professional skill in making a bronchoscopic examination of throat of decedent. Judgment for plaintiff upon jury verdict. Held: Plaintiff's evidence was insufficient to make a case for a jury.

This case is not unusual nor significant and is merely cumulative authority for the proposition that in malpractice cases negligence and want of professional skill in making an examination, or in the treatment of an injury or a disease, the burden is on the plaintiff to prove such negligence or want of skill resulting in injury to the plaintiff and that only one possessed of special learning and knowledge of such skill could testify as an expert witness as to whether a highly technical examination was made in the proper manner and whether proper skill was used.

Footnote 18. Simms v. Gafney Clinic and Hospital, 227 S. W. (2) 848. Plaintiff wife was in an automobile accident and a piece of windshield glass destroyed her left eye and lodged in the wound. It was alleged that the defendant was negligent in failing to remove the glass immediately after the accident and in failing to promptly take x-rays, but it was held that there was no evidence that the plaintiff would not have had her present ill effects if the glass had been immediately removed and if x-rays had been taken more promptly.

Footnote 21. Wilson v. Corbin, Iowa, 41 N. W. (2) 702. The plaintiff in this action had sustained a compression frac-

ture of the third lumbar vertebra. The defendant, his local physician, took a single x-ray and failed to detect the fracture. On the defendant's assurance that nothing was wrong, the plaintiff sought no further treatment for several months. When an expert in Iowa City was called in, complications had developed. In the malpractice action, the lower court directed a verdict for the defendant on the grounds that the plaintiff failed to establish by expert testimony a breach of the medical standards for communities similar to that in which he lived. This was reversed on appeal. The court held that malpractice may consist in a lack of care in diagnosis as well as in treatment. The use of x-rays as an aid to diagnosis is a matter of common knowledge. The showing that defendant had taken only one x-ray was sufficient evidence under the circumstances. The issue of proximate cause was then a problem for the jury.

Footnote 24. Grier v. Phillips, 230 N. C. 672, 55 S. E. 2, 485, decided October 12, 1949. This was an action by administrator for alleged wrongful death of deceased following extraction of her teeth by defendant who was not licensed to practice dentistry as required by statute. Defendant moved for directed verdict and offered no evidence. Held: That the evidence of plaintiff was insufficient to permit a finding of negligence or that defendant's lack of skill as an unlicensed dentist proximately caused decedent's death.

While a person practicing dentistry without a license so to do is required to exercise the care and skill of a licensed dentist, the mere want of a license to practice does not raise any inference of negligence. If an unlicensed practitioner exercises the requisite skill and care in administering treatment to a patient he is not liable in damages for injury to the patient merely because of his want of license.

Footnote 24. Andrews v. Lofton, 80 Ga. App. 723, 57 S. E. (2) 338, decided January 13, 1950. This was an action by plaintiff against physician to recover damages for death of plaintiff's minor child as a result of alleged negligence in operating upon and treating child. Case was before Court upon demurrer to plaintiff's petition. Among other allegations by plaintiff was charge of negligence because defendant was violating the law by his failure to be properly licensed as physician and surgeon. Held: The absence of a license to practice medicine or surgery will not of itself authorize an inference of negligence where one attempts to treat or operate upon another and injures him. (Citing with approval above case of *Grier v. Phillips*). In this particular case, the Court further held that denying to the plaintiff those allegations charging negligence for want of a proper license the plaintiff has nevertheless set forth a cause of action against the defendant because of his negligence in operating upon and treating the infant daughter of the plaintiff which proximately resulted in the child's death. This standard was defined as that degree of care and skill which is ordinarily employed by members of the medical profession under similar conditions and circumstances. On the question of lack of a license to practice medicine, Syllabus Point 5 is as follows:

> "Allegations that duties and liabilities imposed upon defendant by statutes as to necessity of having a license to practice medicine or surgery were due to plaintiff and her child personally and as members of the public seeking medical and surgical care and that death of child was a natural and probable consequence of violation of such statutes by defendant were subject to special demurrer for failure to show anything having a causal relation to death of child."

Footnote 27. Facer v. Lewis, 326 Mich. 702, 40 N. W. (2) 457. The defendant had given x-ray treatments to the plaintiff to remove warts. Severe burns were sustained, and an ulcer and cancer later required amputation of the plaintiff's leg. In the malpractice action, the lower court rendered judgment for the defendant because of a lack of competent testimony for the plaintiff. While laymen are acquainted with the destructive qualities of x-rays, the treatment of warts with x-rays requires skill, judgment, and practice beyond the knowledge of laymen, as admitted by plaintiff's witnesses. Expert testimony must be used exclusively to establish proper or improper methods. Although direct evidence is not necessary, there must be enough from which an inference of negligence may legitimately be drawn. Since *res ipsa loquitur* does not apply in such an instance, the plaintiff produced no such testimony.

Footnote 30. Sinz v. Owens, 205 Pac. (2) 35 [Cal.] "The criterion in this regard is not the highest skill medical science knows; 'the law exacts of physicians and surgeons in the practice of their profession

only that they possess and exercise that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of their profession under similar circumstances.' *41 Am. Jur. Phys. & Surg. sec. 82, p. 201.* The proof of that standard is made by the testimony of a physician qualified to speak as an expert and having in addition, what Wigmore has classified as 'occupational experience — the kind which is obtained casually and incidentally, yet steadily and adequately, in the course of some occupation or livelihood.' *2 Wigmore on Evidence, 3rd Ed. sec. 556, p. 635.* He must have had basic educational and professional training as a general foundation for his testimony, but it is a practical knowledge of what is usually and customarily done by physicians under circumstances similar to those which confronted the defendant charged with malpractice that is of controlling importance in determining competency of the expert to testify to the degree of care against which the treatment given is to be measured."

Footnote 31. McGulpin v. Bessmer, Iowa, 43 N. W. (2) 121, decided June 13, 1950, rehearing denied October 23, 1950. A directed verdict for defendant granted by the trial court was reversed by the Supreme Court, three Justices, however, dissenting. This case will undoubtedly be the subject of considerable discussion and the reader is referred to the decision for a complete understanding of the decision and of the dissent. The first significant point of this decision is the agreement of both the majority and minority that *res ipsa loquitur* is not applicable in a case of treatment for a condition of varicose veins, where amputations were later found necessary. The majority bases its decision to reverse upon failure to submit the charge of abandonment, but in passing holds that in its opinion the trial court should have permitted the testimony of the Chicago physician and surgeon as to standards applicable in Davenport, particularly since there was a holding out of special skill. It is interesting that the dissenting opinion points that there was no offer of proof as to what the Chicago doctor would have testified to, but since the majority reverses for the alleged abandonment the comments of the majority with reference to the admissibility of testimony might well judicially be considered as *obiter dictum* expressed as *caveat.* There seems, however, to be considerable room for wondering whether the question of proximate cause was really proved in this case. The dissenting opinion seems to indicate that in effect the majority is really assuming the central point of the case which was to be proved, and there seems considerable force to the minority's view on this important focus of the decision.

Footnote 31. Morrill v. Komasinski, 256 Wis. 417, 41 N. W. (2) 620. The plaintiff, a resident of Rhinelander, sustained a double fracture of her right humerus. Her local physician and an expert examined x-rays, noted only one fracture, and applied a cast. When it was removed, the pain continued. A local osteopath then detected the second fracture and sent her to an osteopathic surgeon in Detroit. In the malpractice action, the osteopaths testified, that, rather than the cast, some other measure should have been employed. The court ruled that an osteopath licensed to practice surgery was competent to testify as to the degree of care and skill to be exercised by one licensed to practice surgery and medicine. Since basic science courses of study and examinations were identical for surgeons and osteopaths, and since the state licensed osteopaths to practice surgery, this was not an invasion of one field of medicine by one licensed to practice in another. The Detroit osteopath, under a particular Wisconsin statute, could properly testify. There being no showing that the practice of surgery differed between these states, this osteopath need only show a knowledge of practice in Michigan communities similar to Rhinelander. The heads of the orthopedic departments at the University of Wisconsin and at Marquette University (the only medical schools in the state) testified that the method employed by the defendants was proper and that it was so taught at their institutions. The court held, nevertheless, that the evidence produced by the osteopaths was sufficiently favorable to sustain a jury verdict for the plaintiff.

Footnote 49. McGulpin v. Bessmer, Supra. This case discussed fully under footnote 31.

Footnote 50. Ybarra v. Spangard, 154 Pac. 687, (Cal.). In this case, the patient entered the hospital for the purpose of undergoing an appendectomy. When he regained consciousness after the operation he discovered his shoulder had been injured. An action was instituted against the hospital and all the doctors and nurses in attendance on the patient during and after the operation. The trial court granted

judgments of nonsuit as to all defendants. On the appeal, defendants contended: (1) that where there are several defendants and there is a division of responsibility in the use of an instrumentality causing the injury, and the injury might have resulted from the separate act of either one of two or more persons, the rule of *res ipsa loquitur* cannot be invoked against any one of them; and (2) that where there are several instrumentalities and no showing is made as to which caused the injury or as to the particular defendant in control of it, the doctrine cannot apply. In reversing the judgment the Supreme Court of California said:

> "Where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had control of his body or of the instrumentalities which might have caused the injury may properly be called upon to meet the inference of negligence by giving an explanation of the accident." *154 Pac. 2d at p. 691.*

On the second trial of the case all defendants who attended the plaintiff testified that while he was present he saw nothing occur which could have produced the injury to the shoulder. Judgment was rendered in favor of the plaintiff and on the second appeal defendants unsuccessfully contended that the above evidence was sufficient to overcome the *prima facie* case made under the *res ipsa loquitur* doctrine, the District Court of Appeal holding that it was for the trier of fact to weigh the evidence against the presumption (*208 Pac. (2) 445*).

Footnote 51. Wells v. McGehee, 39 Southern (2) 196 (La.). In this case a judgment for dismissal in the lower court was affirmed upon appeal because of insufficiency of evidence of negligence.

In this case the doctor administered chloroform as an anesthetic to a seven-year-old child, preliminary to the reduction of a Colles fracture of the child's right forearm. The child died within a few minutes after the chloroform was administered. It was claimed that malpractice consisted in the administration of the anaesthetic without having made any preliminary examination of the heart and lungs of the child, that the quantity administered was excessive, and no efforts were made to revive the child, and lastly that consent had not been obtained of the parents. As one of the elements of damages, it was claimed that the refusal of the attending physician to give a death certificate resulted in loss of certain rights for double indemnity life insurance policy upon the child.

The court, upon appeal, applied the well-known rule that negligence on the part of a physician or surgeon cannot be presumed or inferred because favorable results were not obtained. To rebut the claim that no proper examination was made by the doctor previous to the administration of the anaesthetic, testimony was received to the effect that the patient's heart was examined by means of a stethoscope and also that the doctor listened to the lungs for any pathosis that might be present and that such examinations conformed to the practice of the medical profession in the locality in which the defendant practiced. The court held further that upon the evidence in the case that there was no basis for the claim that the doctor was negligent in not selecting ether as an anaesthetic instead of chloroform. There was testimony that the anaesthetic was administered by an experienced nurse in general nursing, that it was administered under the direction of the doctor in the usual manner.

The court found that there was no doubt under the testimony but that the child was hypersensitive to chloroform, and further, on the basis of one doctor's testimony that there is no way of determining whether a patient is hypersensitive to certain kinds of anesthetic prior to its application.

There was evidence in the case that the child's nose, face and mouth were burned and that the chloroform was given direct from the bottle without the customary mask. This testimony was refuted by several witnesses. It would seem that a jury question was raised. However, the court disposes of the claim of overdosage on the testimony of the defendant that there was respiratory failure first and the heart continued to beat for several minutes afterwards. The theory of the doctors in the case of an overdose of chloroform, was that the heart stops beating first and the fact that there was respiratory failure indicates that it was due to a toxic condition produced by the chloroform which could result without an overdose.

The contention that liability attached because of failure to obtain the consent of the parents to the administration of an anaesthetic was disposed of by holding that the doctor was confronted with an emer-

gency and was justified in using his judgment in the absence of the parents.

Footnote 51. McPeak v. Vanderbilt University Hospital, et al. 229 S. W. (2) 150. In this case, the plaintiff, a middle-aged woman, was advised by her family physician to go to the defendant hospital where she was accepted as a patient and where her case was diagnosed as thrombophlebitis in the veins of her lower right leg. Evidence showed that the operation was performed by three surgeons in the accepted manner although the desired result was not obtained.

It was held that the plaintiff failed to show by competent evidence that there was any evidence of negligence on the part of the hospital or any of its physicians. The court said, "The unfortunate fact that the operation did not result as contemplated or hoped for does not make the hospital or its doctors responsible in damages."

Footnote 52. Scacchi v. Montgomery, 75 A (2) 535 (Pa. Supr. Ct. 1950). The court upheld the trial court in failing to grant plaintiff's motion to take off a nonsuit.

The surgeon operated upon deceased for an ovarian cyst, removing her right tube and ovary. Shortly after the operation and while plaintiff was in her hospital room, she began to bleed internally, was given plasma, operated upon a second time which disclosed that the ligature had slipped which condition was remedied and the wound closed. Within several hours the deceased developed pulmonary manifestations and died. The doctor was called as on cross-examination. The doctor's testimony showed no evidence of negligence and the court held that even though the defendant was called as under cross-examination, nevertheless the plaintiff was bound by it since the testimony was credible and not rebutted.

The Court also held that the following "admissions" by the defendant did not alter the correctness of the trial court's decision in granting a nonsuit: Defendant "thought he severed a vein or cut too deep;" "it never happened to me before, I must have gone too deep or severed the vein;" "Maybe it happened I went too deep or skipped some vein;" "I skipped some vein or I cut too deep." These statements, says the Supreme Court of Pennsylvania, were too vague or indefinite to establish negligence.

An interesting side light of the opinion is that without discussing the point at all the Court held under the facts of the case as disclosed by the record the defendant surgeon could not be held liable for negligent post-operative care of the deceased by a hospital intern or nurse. (Compare: *Shull v. Schwartz,* 73 A (2) 403, reported herein).

Footnote 52. Shull v. Schwartz, 73 A (2) 403 (Pa. Supr. Ct. 1950). Where the defendant surgeon performed a successful operation on plaintiff and a hospital intern was directed (by whom it is not shown) to remove the stitches which he failed to do properly, although the stitches were not removed in the presence of or under the supervision of the surgeon, the court followed an earlier rule in relieving the doctor of liability by saying that a surgeon's liability does not apply after the operation is concluded to treatment administered by floor nurses and interns in the regular course of the services ordinarily furnished by a hospital; in so acting the nurses and interns are working exclusively on behalf of the hospital and not as assistants to the surgeon. (Compare, *McConnell v. Williams,* 65 A (2) 243, reported herein).

Footnote 52. McConnell v. Williams, 65 A (2) 243 (Pa. Supr. Ct. 1949). This case is rather novel in its application of established principles of the law of agency to circumstances surrounding the relationship between an obstetrician and an intern at a hospital. It is unnecessary to review all the facts but suffice it to say that the intern was negligent; the surgeon himself was not negligent; the surgeon had requested this particular intern to assist him at the Caesarian section (although it was his regular turn on the day in question); the negligence consisted of putting an excessive amount of silver nitrate into the eyes of the infant without flushing them.

The trial court granted a nonsuit and on appeal the Supreme Court reversed a four to two decision.

The majority bottoms its decision strictly on the agency question and says that it was a jury question whether the intern was or was not an agent of the surgeon (although there were no basic disputed facts in the record; the matter was before the Supreme Court on denial of a motion to take off a nonsuit). I recommend a reading of Justice Stearnes vigorous and, what to me at least, appears to be a very able dissent. He points up the fact that if the majority opinion is to be followed, a surgeon in a public (as distinguished from a private) hospital

would be responsible for the amount of Lysol placed in the scrub woman's pail if it were done while she and he were in the room together although this exact analogy was not used by Justice Stearnes.

Footnote 54. Heimlich v. Harvery, 255 Wis. 471, 39 N. W. (2) 394. An assistant of the defendant had treated the plaintiff for piles. Later the defendant rendered the same treatment. Although malpractice was admitted, the defendant argued that the finding of that the damage was the natural and proximate cause was merely speculative. The court disagreed, holding that the evidence provided that preponderance of probabilities necessary to prove proximate cause. Since the defendant acknowledged the acts of his assistant, he was liable by *respondeat superior.*

Footnote 55. Lashley v. Koerber, 156 Pac. (2) 441, 444-445 (Cal.). Plaintiff appealed from a judgment of nonsuit in an action alleging negligence and failure to use x-ray in the reduction of a fracture. The defendant doctor, according to testimony of the plaintiff, stated "that he should have had an x-ray taken in the beginning." In reversing the judgment of non-suit the court said:

> "The expert testimony which establishes plaintiff's *prima facie* case in a malpractice action may be that of defendant. (*Lawless v. Calaway* (1944), 24 Cal. (2) 81, 90, 147 P. 2d 604; *Anderson v. Stump* (1941), 42 Cal. App. 2d 761, 765, 109 P. 2d 1027). We can presume that defendant in testifying will state his case as favorably to himself as possible. (See *Alper v. Tormey* (1907), 7 Cal. App. 8, 12, 93 P. 402). And extrajudicial admissions of defendant have the same legal competency as direct expert testimony to establish the critical averments of the complaint. (*Scott v. Sciaroni* (1924), 66 Cal. App. 577, 582, 226 P. 827). It is true that an extrajudicial statement amounting to no more than an admission of bona fide mistake of judgment or untoward result of treatment is not alone sufficient to permit the inference of breach of duty; the statement 'must be an admission of negligence or lack of the skill ordinarily required for the performance of the work undertaken.' "
>
> "An extrajudicial admission of 'fault' it has been held, may amount to no more than the admission of bona fide mistake or misfortune and thus be insufficient to establish negligence (*Phillips v. Powell* (1930), 210 Cal. 39, 43, 290 P. 441, 443 [admitting that 'it is my fault']; *Markart v. Zeimer* (1924) supra, 67 Cal. App. 363, 371, 227 P. 683 [admission that defendant performed a 'wrong operation']; *Donahoo v. Lovas* (1930), 105 Cal. App. 705, 707, 710, 288 P. 698, 699 [admission that defendant 'should never have' administered an injection 'and that was what was causing' plaintiff pain]), or it may support the inference that plaintiff was damaged as a proximate result of defendants' negligence (*Scott v. Sciaroni* (1924), supra, 66 Cal. App. 577, 580, 582, 226 P. 827, 828 [admission that defendant's nurse 'left the radium on too long' and 'it was his [defendant's] fault' that plaintiff was burned])."

Report of Marine Insurance Committee

EXCEPT for a brief meeting at the close of last year's Convention at The Greenbrier, the work of your Marine Insurance Committee has necessarily been conducted by correspondence. This Report is a composite of memoranda submitted by members of the Committee concerning subjects believed to be of interest and value to the members of our Association.

Our Report deals with three principal subjects, namely:

I. Government War Risk Insurance.
II. Limitation of Liability (Conflict of Laws).
III. Third Party Suits (Longshoremen's and Harbor Workers' Compensation Act).

I. *Government War Risk Insurance.*

Public Law 763 of the 81st Congress, amending the Merchant Marine Act of 1936 by adding thereto a new title known as "Title XII—War Risk Insurance," which was before Congress when this Committee rendered its last report,[1] was approved on September 7, 1950 and is now in force.

[1]Insurance Counsel Journal—Vol. XVIII, No. 1, p. 67.

The bill authorizes the Secretary of Commerce, only with the approval of the President, and in accordance with commercial practice in the marine insurance business, to provide insurance and reinsurance against loss or damage by war risks "whenever it appears to the Secretary that such insurance adequate for the needs of waterborne commerce in the United States cannot be obtained on reasonable terms and conditions from companies authorized to do an insurance business in a State of the United States."

This is stand-by legislation to authorize the Government to provide war risk insurance if it cannot be obtained on reasonable terms and conditions in the American market, whether or not we may be technically at peace at the time. In the last two World Wars, the United States adopted similar legislation. It was felt the Government should be given the authority to provide such insurance beforehand and the passage of enabling legislation should not be delayed until the country is actually embroiled in war as was done in the last two World Wars.

American vessels, including vessels under construction, foreign flag vessels owned by citizens of the United States, vessels engaged in transportation in the commerce of the United States, or other transportation by water, or in such services as may be deemed in the interests of the national defense and economy, cargoes shipped or to be shipped on such vessels, owned by citizens or residents, cargoes imported to or exported from the United States, cargoes moving between United States ports, freight and passage money of vessels and vessel disbursements, and personal effects of masters, crews and passengers, can obtain the benefits of such war risk insurance. The Secretary of Commerce may also provide, in his discretion, marine and liability insurance for masters, officers, members of the crews of such vessels and other persons employed or transported thereon, covering personal effects and against loss of life and injury, and in the case of a vessel owner or charterer, against statutory or contractual obligations or other liabilities of the nature customarily covered by insurance.

The American Underwriters' Marine Institute form of war risks policy provides:

"1. This insurance is only against the risks of capture, seizure, destruction or damage by men-of-war, piracy, takings at sea, arrests, restraints, detainments and other warlike operations and acts of kings, princes and peoples in prosecution of hostilities or in the application of sanctions under international agreements, whether before or after declaration of war and whether by a belligerent or otherwise, including factions engaged in civil war, revolution, rebellion or insurrection, or civil strife arising therefrom, and including the risks of aerial bombardment, floating or stationary mines and stray or derelict torpedoes *and weapons of war employing atomic fission or radioactive force;* but excluding claims for delay, deterioration and/or loss of market, and warranted not to abandon (on any ground other than physical damage to ship or cargo) until after condemnation of the property insured."

The Secretary of Commerce, through the Federal Maritime Authority, is now engaged in preparing the necessary forms and procedures to carry out the intent of the Act which is to provide the cover now obtainable commercially if and when the war risk insurance and other forms of insurance provided for therein cannot be procured in the commercial market. Atomic damage caused in any manner other than by weapons of war, is now covered by the standard marine policy and such damage caused by weapons of war, is covered by war risk policies obtainable in the commercial market, and when not so obtainable, will be covered by Government insurance.

II. *Limitation of Liability (Conflict of Laws).*

One of the most interesting questions involving Admiralty Law concerns itself with the Limitation Statutes[2] and whether or not the limitation laws alter substantive rights, or are remedial in nature.

A case which has brought this question into prominence of late is the case involving the Canadian Steamship Lines, Limited, as a result of the burning of the SS NORONIC at its dock in Toronto, Canada, on September 17, 1949.

The Canadian Steamship Lines, Limited, was organized under the laws of the Dominion of Canada, and had an office for business purposes in Cleveland, Ohio. The

[2] "An Act to Limit the Liability of Shipowners and for Other Purposes" (Mar. 3, 1851) as amended. (46 U. S. C. §§ 182 et seq.)

Canadian Steamship Lines, Limited, is the sole owner of the SS NORONIC.

The NORONIC was a single screw passenger vessel of Canadian register built at Port Arthur, Ontario, in 1913. The NORONIC was engaged in passenger and freight service on the Great Lakes and their connecting and tributary waters.

On September 14, 1949 the NORONIC started a voyage from the Port of Detroit, Michigan, and in the course of the trip stopped at Cleveland, Ohio, to take on additional passengers. The NORONIC arrived at Toronto, Canada on September 16, 1949 and while it was moored at the dock of the Canadian Steamship Lines, Limited, a fire started on "C" deck at 1:30 o'clock A. M. on September 17, 1949. As a result of this fire one hundred nineteen passengers lost their lives, and there was considerable loss and damage to the baggage and personal effects of all passengers and crew.

As a result of the fire, it is estimated that the claims which may be made may exceed the total sum of three million dollars.

The value of the interest in the SS NORONIC in its burned condition is estimated at $30,750.00.

Lawsuits were filed in Cleveland, Ohio, on behalf of the deceased and injured passengers, so that as a result thereof the representatives of the Canadian Steamship Lines, Limited, then and there petitioned the United States District Court at Cleveland, Ohio, to exonerate itself from, or to limit its, liability as to the claims and lawsuits filed, or to be filed, against it as a result of this unfortunate occurrence.

The petitioner argues that since the accident occurred within the territorial waters of the Dominion of Canada, the laws of Canada will apply not only to the questions as to tort liability but, also, as to the limitation of liability statutes. Accordingly, under the Canada Shipping Act of 1934, §§ 649, 651, 658, the petitioner filed a stipulation for payment of $448,409.40 into the Court's Registry seeking to limit its liability under the laws of Canada.

The limitation of liability statute as to the United States would seem to indicate that the amount necessary to be paid into court under the American Limitation of Liability Law would be in the sum of $370,000.00, which is the lesser of the two sums referred to hereinabove.

The question then is raised as to whether or not the Limitation of Liability Laws of Canada or of the United States would apply under the circumstances related.

Apparently the laws of Canada entitle the owner to limit liability where loss of life or personal injury is caused "without their fault or actual privity."

Under the interpretation of the United States law as to limitation of liability there could not be a limitation of liability if the owner fails to meet the burden of proof in establishing that the loss was occasioned "without privity or knowledge of the owner." It is further understood that the United States law includes "knowledge of unseaworthiness," which is not set forth in the Canadian Limitation of Liability Laws.

Of course, the limitation of liability question will be contested so that it will be necessary to withhold proof of damage until such time as the limitation question is settled. After the decision as to whether Canadian or United States law will apply, then proof of damage will be made by the various claimants and litigants.

Of course, it will be of advantage to the claimants and litigants to seek to urge application of the laws of the United States, because if the claimants and litigants can prove knowledge and negligence on the part of the owners, there will be no limitation of liability, and the claimants and litigants will have an unlimited sum at their disposal in the event of an adjudication in their favor.

If the laws of Canada are held to be applicable, the claimants and litigants will be deprived of their right to prove "knowledge of unseaworthiness," which will be of advantage to the owner of the NORONIC.

It has been argued that if the source of obligation is the foreign law that then the defendant in such a case is entitled to urge whatever conditions or limitations the foreign law creates.

It goes without saying that the procedural steps in perfecting a limitation of liability pleading are governed by the laws of the forum, but the question as to whether or not the law of the forum will apply as to the actual decision pertaining to the applicability of the foreign or United States law has been a hotly contested question in numerous cases.

In 1881 Justice Bradley indicated in the decision involving THE SCOTLAND that the limitation of liability law of the forum should be applied in the absence of a *lex loci delicti* on the high seas. See 105 U. S. 24, 29-30; 26 L. Ed. 101.

In the decision rendered in the case involving *Oceanic S. N. Co. v. Mellor,* 233 U. S. 718, 731-733; 58 L. Ed. 1171, Mr. Justice Holmes, in the opinion, ruled that foreign limitation laws are not enforced by courts of the United States. It was decided that the limitation of liability must be determined by the laws of the forum despite the fact that the cause of action occurred elsewhere than in the jurisdiction in which the suit was filed.

Many arguments have been raised to the effect that the *lex loci delicti* governs; that the responsibility arises from contract, and that the place of the making of the contract applies; or that the law of the flag applies. However, the questions seem to have resolved themselves into the fact that the United States Courts will apply the United States laws as to limitation of liability, even though the source of obligation is to be determined by a foreign law. Therefore, limitation actions are treated as laws of procedure, and as belonging to the *lex fori,* and are considered as affecting the remedy only, and not the right.

In support of the above, see § 411, Restatement of Conflict of Laws, as follows:

> "The limitation of liability in a Maritime cause of action is determined by the law of the forum, irrespective of the law which created the cause of action."

Also, it is interesting to note that in a collision which occurred in Belgian waters, the United States Court refused to permit the pleading or proving of the Belgian Limitation of Liability Statute. See: *Royal Mail S. P. Co. v. Cia de Navegacao Lloyd Brasileiro,* 1929 A. M. C. 195, 31 F. (2d) 757.

It might be well in passing to indicate that the limitation of liability statute extends to the oceans, the Great Lakes and rivers, and all public navigable waters of the United States connecting therewith. Also, collisions inside the three mile limit (from shore) are within the limitation of liability statutes, and benefit thereof may be had by any owner of a vessel seeking to invoke the limitation statutes. The statutes also apply to disasters occurring above tide waters, but do not extend to navigable waters solely within a state and having no connections with another state except when involved in interstate commerce.

The liability statutes are also applied in proceedings in Admiralty Courts occurring on the high seas outside the territorial limits of the United States. Owners of foreign vessels may limit their liability when sued in the United States despite the fact that the laws of any other country provide for limitation of liability upon terms and conditions different from the laws of the United States respecting limitation.

Therefore, it seems that under the facts related hereinabove, and since these cases and claims have been filed and made in the United States Court, that the United States Court at Cleveland, Ohio will apply the limitation of liability statutes of the United States, instead of applying the limitation of liability statutes of Canada, despite the fact that the petitioner has paid into the Court's Registry the sum of $448,409.40, which is the maximum amount required under an interpretation of the Canadian law.

If the foregoing is true, then the litigants and claimants may go forward with proof of "knowledge of unseaworthiness," which will have a material effect upon the question as to whether or not Canada Steamship Lines, Limited, will be in a position to successfully claim a limitation of its liability.

III. *Third Party Suits (Longshoremen's and Harbor Workers' Compensation Act—33 U. S. C. A., §§ 901-950).*

Congress on March 4, 1927 passed the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. §§ 901-950, as amended) granting to longshoremen and harbor workers compensation in respect to disabilities or death resulting "from injury occurring upon the navigable waters of the United States" where "workmen's compensation proceedings may not validly be provided by state law." The plan was upheld as constitutional by reason of the "general authority of Congress to alter or revise the maritime law."[3] This was a result of a development of a concept of national maritime unity which the Supreme Court insisted upon in the years of litigation following the decision of *Southern Pacific Co. v. Jensen.*[4] The Act provides for an exclusiveness of liability of the

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[3] *Crowell v. Benson,* (1932) 285 U. S. 22, 52 S. Ct. 285, 76 L. Ed 598.

[4] (1917) 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086. See Robinson on Admiralty, 111.

employer.[5] The employee may recover damages against a third party liable for damage in lieu of taking compensation by electing to sue or the employer or his underwriter may as a matter of subrogation recover compensation paid the employee from a third party liable for damages.[6] The Act makes no mention of the rights of third parties against an employer or other party who may be wholly or partly to blame for injury or death of the longshoreman or harbor worker.

As the injured longshoreman or harbor worker or his representative in the case of wrongful death usually can recover a greater amount in a third party suit than the amount he would receive in compensation from his employer there are a large number of third party suits. The third party who may be liable for damages in such an action in turn naturally seeks recoupment in whole or in part by way of contribution or indemnity from any other party who may be partly or wholly at fault for causing the injury. Frequently appearing and typical are cases where a longshoreman is injured or sustains death on navigable waters while engaged in loading or unloading a vessel for his employer. A suit is instituted against the vessel or vessel-owner by the injured party and the shipowner in turn brings an action over against the employer claiming the right of contribution or indemnity.

The right of contribution or indemnity may depend upon the indemnity provisions of the stevedoring contract which are frequently made a part of the contract between the vessel-owner and the stevedoring company, the terms of which provide for indemnification to the vessel-owner for loss and damage arising out of the work undertaken.[7] If the rights of the shipowner and stevedoring company are clearly defined by contract, no particular problem is presented in determining upon whom the loss shall fall. However, if the indemnification provisions of the contract are ambiguous or insufficient to cover the situation the courts are bound to resort to applicable principles of law governing the rights of the parties. In third party suits where the shipowner or other third party seeks contribution or indemnity the courts have reached different conclusions under nearly identical facts. The Court of Appeals for the Second Circuit has granted full indemnity under common law principles of indemnity where there has been a breach of an implied duty under the contract, such as failure of the stevedoring company to properly perform the work.[8]

The Court of Appeals for the Ninth Circuit reached a result similar to the Second Circuit in allowing a shipowner full indemnity.[9]

No recovery by way of contribution or indemnity was allowed the shipowner, however, in the Second Circuit, where *both* the shipowner and the stevedoring company were negligent in causing injury to a longshoreman employee.[10]

The Ninth Circuit reached an opposite conclusion to that of the Second Circuit in a case where both the shipowner and the stevedoring company were negligent, on the common law theory of active and passive negligence. The Court decided that the active negligence of the stevedoring company caused the injuries to longshoremen entitling the shipowner to full indemnity. The stevedoring company had knowledge of the defective condition of a winch which caused it to slip, which winch was supplied by the shipowner as a part

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[5] 33 U. S. C. A. § 905. "The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . . "

[6] 33 U. S. C. A. § 933.

[7] See *Porello v. United States* (1946–2 CCA) 153 F. (2d) 605; *Lo Bue v. United States* (1950–EDNY) 91 F. Supp. 298.

[8] *Rich v. United States* (1949–2 CCA) 177 F. (2d) 688. The vessel-owner impleaded the stevedoring company, alleging that it was the negligence of the stevedoring company in improperly securing a Jacobs Ladder which caused injuries to the longshoreman, who had sued the vessel-owner. The Court held that a good cause of action over was stated against the stevedoring company based on the latter's independent duty to indemnify the vessel-owner for the loss sustained as a result of improper performance of the work.

[9] *United States v. Arrow Stevedoring Company* (2 cases 1949), 175 F. (2d) 333, 175 F. (2d) 329.

[10] *American Mutual Liability Ins. Co. v. Matthews* (1950–2 CCA) 182 F. (2d) 322. The basis of this decision was that the "common liability" requisite for contribution did not exist. Under the Act the stevedoring company's liability was to pay compensation and there was no common liability with the shipowner for damages arising out of negligence.

of the ship's equipment.[11]

The dilemma in which the courts have found themselves when confronted with a situation where both the shipowner and stevedoring company are negligent was partially solved by the Court of Appeals for the Third Circuit in holding on principles of admiralty, that the case was one of mutual fault entitling the shipowner to a recovery from the stevedoring company. However, the recovery was limited to the amount of compensation payable to the longshoreman had he elected to receive compensation under the Act.[12]

Another possibility is that the Act shall act as a complete bar to third party suits. This view has support in at least two cases.[13] However, once the conclusion has been reached that the wording of the Act (33 U. S. C. A. §905) "anyone otherwise entitled to recover damages" refers only to persons standing in the employee's shoes and therefore the exclusiveness of liability applies only as between the employer and employee or one in the shoes of the employee, the Act affords no bar or restriction on the liability of the employer in third party suits involving an employer under the Act.

As all such suits must necessarily be matters of admiralty jurisdiction, the paramount principles of maritime law should govern.

Under admiralty principles of dividing the loss among the several wrongdoers the following simple rules would appear to work a harmonious and equitable result.

1. Where a third party is solely at fault, the employer (or its underwriter) may sue such third party "liable in damages" and recover in full for compensation paid and damages on behalf of the injured employee.

2. Where the employer is found solely at fault no recovery is allowed against such third party.

3. Where both the employer and third party are at fault the loss should be equally divided.[14] If the employee is granted a recovery of full damages in an action against a third party who is only partially at fault, then the third party should be entitled to contribution from the employer.

The maritime law of doing equity or working substantial justice by dividing damages among wrongdoers should be as broad as it is long. A number of District Courts have found no difficulty in arriving at such an equitable result by dividing the loss by following admiralty principles.[15]

Maritime rights are to be determined according to maritime law not only when the parties seek a maritime remedy in the Admiralty Court, but also when they seek a common law remedy under the "saving clause" of the Judiciary Act of 1789.[16]

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[11] *United States v. Rothschild-International Stevedoring Company* (1950–9 CCA) 183 F. (2d) 181. It is difficult to distinguish this case on the facts from the Second Circuit case of *American Mutual Insurance Company v. Matthews*, supra, where recovery was denied. The Second Circuit recognizes that the two cases are incompatible. *Slattery v. Marra Bros.* (1950–2 CCA) 186 F. (2d) 134, 139.

In the *Matthews* case the stevedoring company used patently defective ropes supplied by the shipowner. In both the *Matthews* and *Rothschild* cases it appears that both the shipowner and the stevedoring company were guilty of fault which contributed to the injury of the longshoreman.

[12] *Baccile v. Halcylon Lines* (1951–3 CCA) 187 F. (2d) 403. In this case the longshoreman fell when a gangplank by the vessel gave way. Both shipowner and the stevedoring company were negligent, the former for failing to provide a safe place to work by furnishing a defective gangplank, and the latter for failing to inspect. Compare with *Spaulding v. Parry Nav. Co.* (1951–2 CCA) 187 F. (2d) 257. The *Baccile* case recognizes admiralty principles of equity by a division of damages but favors the employer under the Act by giving him a limitation of liability not specifically provided for in the Act. Such a limitation is not consonant with admiralty principles of an equal division of damages. The third party, such as the shipowner, not only is liable for its portion of a moiety but is liable for such additional amount as the employer is exempted from paying or the amount exceeding the employer's liability for compensation.

[13] *Johnson v. United States* (1940–D. C. Ore.) 79 F. Supp. 212; *Standard Wholesale Phosphate & Acid Works, Inc. v. Rukert Terminals Corp.* (1949–Md.) 1949 A. M. C. 818, 824, 65 Atl. (2d) 304, 307.

[14] The ultimate rule may not be an equal division of damages but may be one of comparative negligence. In *American Stevedores, Inc. v. Porello*, 330 U. S. 446, 91 L. Ed. 1011, the Court said:

"Although the usual rule in admiralty, *in the absence of contract*, is for each joint tort feasor to pay the injured party a moiety of the damages, The Alabama, 92 U. S. 695, 23 L. Ed. 763; The Atlas, 93 U. S. 302, 23 L. Ed. 863; Barbarino v. Stanhope S. S. Co. (CCA 2d NY) 151 F. 2d 553, we do not believe that the last alternative, which provides for a measure of comparative negligence, is necessarily beyond the intent of the parties. *Comparative negligence is not unknown to our maritime law. The Max Morris*, 137 U. S. 1, 34 L. Ed. 586, 11 S. Ct. 29; *The Henry S. Grove* (D. C.) 22 F. (2d) 444; see Robinson, Admiralty, p. 91. . . . " (Italics ours).

[15] *American Mutual Liability Ins. Co. v. Matthews*, (1950–USDC NY) 87 F. Supp. 854 (reversed on appeal, 182 F. Supp. 322); *Rederii v. Jarka Corp.*, (DC. Me.) 26 F. Supp. 304: *The Tampico*, (DC NY); *The SS Samovar*, (DC Cal.) 72 F. Supp. 574, 588; *Portel v. United States* (DC NY) 85 F. Supp. 458, 462; *Barber S. S. Lines v. Quinn Bros.* (1950 D. C. Mass.) 94 F. Supp. 212.

[16] See Volume 1, Benedict on Admiralty, 6th Edition, p. 55.

The procedural aspects of applying Admiralty principles are comparatively simple. Admiralty Rules provide for bringing in a party "who may be partly or wholly liable either to the libelant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter."[17] Third party procedure is likewise provided for on the law side of the Federal Courts,[18] and a third party procedure in connection with third party suits involving the Longshoremen's and Harbor Workers' Act has been found to apply in at least one State Court.[19]

Whereas cases holding the Act to be a complete bar are influenced by an emphasis on the historical development of State Compensation Acts,[20] other cases are influenced chiefly by the niceties of common law principles of negligence. There has always been difficulty in departing from the common law principle that there shall be no contribution among joint tort feasors[21] The biggest step forward in arriving at a satisfactory conclusion by an appellate court has been made by the Third Circuit in its recent decision.[22]

The Third Circuit and the Supreme Court might well take a bolder step and go all the way in adopting the view that maritime principles of law and substantial justice should govern. On the other hand, as has been frequently argued, the Supreme Court may hold that the liability of an employer who has complied with the Act *is exclusive.*[23]

The contest in all such cases is really one among underwriters. The shipowner is fully protected by P. & I. insurance and other "third parties" in the maritime industry are usually fully protected by some form of liability or indemnity insurance. The employer under the Act is invariably protected by comprehensive liability insurance which is frequently a part of the required compensation policy. The maritime industry in any event, through its premiums to underwriters, pays the loss occasioned by injury or death of persons subject to the Act. It is of importance to the industry and to their underwriters, who play such an important part in the picture, to have simple, workable rules of law by which to determine and apportion such losses. It is to be hoped that these uncertainties in the law will soon be definitely resolved by appropriate decisions of the United States Supreme Court or by clarifying Congressional enactment.

Your Committee as a whole gratefully acknowledges the special assistance of J. Newton Nash and Harley J. McNeal in preparing subjects I and II of this Report.

Respectfully submitted,

STANLEY B. LONG, *Chairman*
GEORGE EUGENE BEECHWOOD, *Vice Chairman*
WILLIAM A. PORTEOUS, JR., *Vice Chairman*
GEORGE A. BLANCHET
CHARLES STEPHEN BOLSTER
LAMAR CECIL
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HARLEY J. MCNEAL
RICHARD B. MONTGOMERY, JR.
THOMAS F. MOUNT
J. NEWTON NASH
PETER REED
CLAUDE E. WAKEFIELD
MORRIS E. WHITE
W. H. WHITE
ROBERT M. NELSON, *Ex Officio*

[17] Admiralty Rule 56 (28 U. S. C. A.).
[18] Rule 14 F. R. C. P.
[19] *Standard Wholesale Phosphate & Acid Works, Inc. v. Rukert Terminals Corp.,* (1949—Md.) 1949 A. M. C. 818, 65 Atl. (2d) 304.
[20] *Johnson v. United States* (1940—D. C. Ore) 79 F. Supp. 212; *Standard Phosphate and Acid Works, Inc. v. Rukert Terminals Corp.,* (1949—Md.) 1949 A. M. C. 818, 65 Atl. (2d) 304; *Liberty Mutual Ins. Co. v. Vallendingham* (1950—D. C., Dist. Col.) 94 F. Supp. 17.
[21] *Rich v. United States* (1949—2 CCA) 177 F. (2d) 688; *United States v. Arrow Stevedoring Company* (2 cases, 1949), 175 F. (2d) 333, 175 F. (2d) 329; *American Mutual Liability Ins. Co. v. Matthews* (1950—2 CCA) 182 F. (2d) 322; *United States v. Rothschild-International Stevedoring Company* (1950—9 CCA) 183 F. (2d) 181; *Spaulding v. Parry Nav. Co.* (1951—2 CCA) 187 F. (2d) 257.
[22] *Baccile v. Halcylon Lines* (1951—3 CCA) 187 F. (2d) 403.
[23] *Johnson v. United States* (1940—D. C. Ore.) 79 F. Supp. 212; *Standard Phosphate and Acid Works, Inc. v. Rukert Terminals Corp.,* (1949—Md.) 1949 A. M. C. 818, 65 Atl. (2d) 304; *Liberty Mutual Ins. Co. v. Vallendingham* (1950—D. C., Dist. Col.) 94 F. Supp. 17.

Report of Workmen's Compensation Committee

Exclusive Remedy Theory Under Workmen's Compensation Law And The Coverage Afforded Under Section I-B Of The Standard Workmen's Compensation Policy

Theory of Statutes

WORKMEN'S compensation legislation has arisen during the last forty years in the United States because of certain conditions produced by modern industrial development. It is, of course, necessary, in this era, to provide a speedy and ideally, and inexpensive method by which the injured employee may secure redress for his injuries. All of the Workmen's Compensation laws are creatures of statutory action, and the whole system is in derogation of the common law. Each party or class of society, that is employer and employee, gives up certain rights and remedies in exchange for other rights and remedies. Economically, the reason for Workmen's Compensation legislation is to improve the status of the worker, and to transfer from the worker to the industry in which he is employed, and therefore ultimately to the public, a larger proportion of the economic loss because of the injury or death of such employee. The employer sacrificed his defenses of contributory negligence, fellow servant's negligence, and assumption of risk in return for a specified schedule of limited liabilities, and in exchange for making such recovery the employee's exclusive remedy. The employee, on the other hand, gave up the chance for a possible greater recovery in a common law action in exchange for a more certain recovery for a limited amount, either through administrative channels, or if the decision there was unsatisfactory, through the courts where the employer's common law defenses would not be available.

As stated by Mr. A. L. Plummer, in his excellent article on the Exclusive Remedy Theory (*Insurance Counsel Journal, January, 1951, Page 32*):

> "The judiciary of our land have found their task most difficult in rendering decisions in some cases where there existed an apparent conflict between the mandates of a Workmen's Compensation law and some other statutory enactment. Advocates at the Bar and many of our citizens have been disappointed and alarmed at times at those decisions, feeling that the rule of right should have been declared by the legislature and not pronounced by the court. There is a school of thought that this situation prevails more and more today."

The purpose of this report is to analyze certain of the inroads which have been made by the judiciary to circumvent this basic philosophy of Workmen's Compensation Statutes and further to examine the coverage afforded the employer under the standard Workmen's Compensation policy in this particular type of situation. The concern over this type of situation has been very succinctly stated by the court in the opinion of *Johnson vs. United States, et al,* (District Court, D.Oregon, 1948) 79 Federal Supp. 448 as follows:

> "In my time compensation supplanted litigation in the industrial field. The State of Washington was the first, and Oregon was one of the earliest States to pass compensation laws. This was because of the paramount influence of the logging and lumbering industry in both states. The cruel injustice to workmen in this industry, where the percentage of casualty is high, of leaving injured men to the harsh and inadequate remedies provided by the common law, brought about the passage of compensation acts. The movement swept the country.
>
> "To hold that an employer under a compulsory (as to him) compensation act can be sued indirectly, as proposed here, is like opening a hole in a dike. It destroys the basic principle of compensation. As well say the employer can be offered to the injured workman as a co-defendant, under Admiralty Rule 56, 28 USCA following Section 723. The difference is a matter of words only."

Liability of Employers Under Admiralty Jurisdiction of the United States

Where the tort is maritime in nature and subject to the Admiralty Jurisdiction of the United States, the liability of an employer to his employees is governed by the *Longshoremen's and Harbor Workers' Compensation Act of the United States.* In construing this particlar act, the courts are bound by the decisions of the Federal Courts. That portion of the act which is pertinent to our inquiry reads as follows:

> "Exclusiveness of Liability. The liability of an employer prescribed in Section 904 of this Chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband, or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . ." *(33 U.S.C.A. Section 905).*

The courts in interpreting this provision have uniformly held that this section prevents the injured employee from bringing suit directly against a negligent employer to recover anything other than the compensation benefits provided for in the act. However, the employee may elect to proceed under Maritime law against a negligent third party; or, in case he elects to go ahead and receive his compensation, the act provides for an assignment of his rights against the third persons to the employer, binding the latter to remit to him any excess over the compensation received, including medical expenses. In the situation, however, where an injured employee brings suit against a third party and the negligent third party in an action over seeks contribution or indemnity from the employer, the law is not clearly settled. If the employer is brought in as the third party defendant, and the employee recovers in his action against the negligent third party, the employee is permitted to recover indirectly, that which he could not recover directly under the exclusive remedy theory. In the case of *The Tampico,* (District Court W. D. New York) 942, 45 Federal Supp. 174, the libelant, a stevedore, sustained injuries while working in the hold of a barge which was alleged to be in a defective and dangerous condition. He brought the libel to recover damages against W. E. Hedger Transportation Corporation, the owner of the barge, charging the defective and dangerous condition and Hedger impleaded the steamer, The Tampico, and The Nicholson Transit Company claiming the right of contribution from Nicholson on the ground of negligence of The Tampico and her owner in the operation of a clamshell bucket. Judgment was for the full amount of libelant's damages against W. E. Hedger Transportation Corporation, but the court also provided that this corporation should have contribution from The Nicholson Transit Company for one half (½) the amount paid. In sustaining this right of contribution, the court stated:

> "The libelant, being free from fault, is entitled to recover from Hedger, who by its negligence contributed to libelant's injuries, to the full extent of his damages . . . Nicholson's liability to Hedger must be decided in accordance with the Admiralty principle of the right to contribution between wrong doers. Analogies attempted to be drawn from other sources are without persuasive force. The rule of the common law, even that there is no contribution between wrong doers, is subject to exception. Whatever its origin, the Admiralty Rule in this country is well known to be the other way. . . . Nicholson, having secured the payment to its employees of compensation under the *Longshoremen's and Harbor Workers' Compensation Act,* 33 U.S.C.A. Section 901 et seq., is immune from suits for damages resulting from libelant's injuries brought by the libelant or anyone in his right, according to the provision of Section 905 of the Act. But the right in Admiralty to contribution between wrong doers, does not stand on subrogation, but arises directly from the tort . . . The immunity given Nicholson by the statute from suits arising out of libelant's injuries furnishes no defense against Hedger's claim to contribution as between joint tort feasors."

In the recent case of *Rich vs. United States, et al* (United States Court of Appeals, 2nd Circuit, November, 1949) 177 Federal 2nd 688, the libelant was a tank cleaner employed by Pyrate Tank Cleaners, Inc. His employer was performing

a contract it had made to clean the tanks of the S. S. William Crompton, a vessel owned and operated by the United States. Rich was injured by falling from a Jacob's ladder while working on the job and the cleaner company was liable to him under the *Longshoremen's and Harbor Workers' Compensation Act*, and made payments as that statute required for twenty-eight (28) weeks. Then Rich elected to sue a third party and brought this suit against the United States. The United States impleaded Pyrate as a third party defendant on the ground that the employer's negligence in not securely fastening the ladder over the side of the ship rendered the employer solely liable for libelant's injuries. The District Court denied the United States' petition to implead Pyrate, but the Circuit Court reversed this decision on appeal. The court used the following language:

"If it should turn out that the libelant's injuries were primarily caused by the negligence of his employer in fastening the ladder insecurely for his use, the United States would have a cause of action against the employer, based upon the latter's independent duty to indemnify it for any loss sustained by the libelant's election to sue it for injuries. It was so held in *Westchester Lighting Company vs. Westchester County Small Estates Corporation*, 278 NY 175, 15 NE 2nd 567, where it was decided that the New York Workmen's Compensation Act containing almost precisely the same language as that now relied upon in the Longshoremen's and Harbor Workers' Act did not bar a suit for indemnity. It was there said that the third party does not sue the employer for damages 'on account of' the injury to or death of the employee, *but for breach of an independent duty owing to the third party by the employer*. 15 NE 2nd 567, 568. Perhaps it is presently of little significance, but we have already followed this New York decision in a suit under the New York act, where there was Federal jurisdiction because of diversity and where also the tort proved was not joint. *Burris vs. American Chicle Company*, 2nd Circuit, 120 Federal, 2nd 218, 222. At least it shows that the rule of indemnity is not exclusively one in admiralty or that of a collision situation.

"Since the United States, if held liable in this suit could sue the libelant's employer for indemnity despite the provisions of the *Longshoremen's and Harbor Workers' Compensation Act*, we can perceive no sound reason why it should not be allowed to accomplish the same result by way of impleading the employer in this action."

Other courts following the same theories as mentioned in the above two cases also point out that this right of contribution or indemnity is not a derivative right through substitution or subrogation, but is an original right arising from the tort itself. Contribution or indemnity is not damages, so as to come under the language "otherwise entitled to recover damages", and therefore the third party has the same rights and remedies of contribution and indemnity against the employer as existed under the admiralty law prior to the passage of the Longshoremen's Act. The following are such cases:

Rederii v. Jarka Corporation (D.C. S.D. Me., 1939), 26 Fed. Supp. 304.

Calvino v. Pan Atlantic S. S. Corporation (D.C.S.D. N.Y., 1939), 29 Fed. Supp. 1022.

The Tampico (D.C.W.D. N.Y., 1942), 45 Fed. Supp. 174.

Brosnan v. American President Lines, 1943, A.M.C. 526.

Green v. War Shipping Administration (D.C.S.D. N.Y., 1946), 66 Fed. Supp. 393.

Severn v. United States (D.C.S.D. N.Y., 1946), 69 Fed. Supp. 21.

The S. S. Samivar (D.C.N.D. Calif., 1947), 72 Fed. Supp. 574.

Christon v. United States (D.C.E.D. Pa., 1947), 8 F.R.D. 327.

Landgraff v. United States (D.C.E.D. Pa., 1947), 75 Fed. Supp. 58.

LoBue v. United States (D.C.E.D. N.Y., 1947), 75 Fed. Supp. 154.

Coal Operators Casualty Company v. United States (D.C.E.D. Pa., 1947), 76 Fed. Supp. 681.

Rederii v. Jaraka Corporation (D.C. S.D. Me., 1949), 82 Fed. Supp. 285.

Bow v. Pellato (D.C.S.D. Calif., 1949), 82 Fed. Supp. 399.

Portel v. United States (D.C.S.D. N.Y., 1949), 85 Fed. Supp. 458.

American Mutual Liability Insurance Co. v. Matthews (D.C.E.D. N.Y., 1949), 1950 A.M.C. 303.

Rich v. United States (C.C.A. (2d) Circ., 1949), 177 Fed. (2d) 688.
Barbara v. Ransom (N.Y. Sup. Ct., Kings Cty., 1948), 79 N.Y.S. 438.

The case which perhaps has aroused the most interest among insurance counsel is that of *Hitaffer v. Argonne Company, Inc.* (U.S. Court of Appeals, D. C. Cir., May, 1950), 183 Fed. (2d) 811, Writ of Certiorari denied, 71 S. Ct. 80. In this case Lucia Hitaffer brought action against the company, employer of her husband to recover for loss of consortium because of negligent injuries to him. While in the Argonne Company's employ, the husband was severely injured in and about his abdomen, and as a consequence the wife was deprived of his aid, assistance, and enjoyment, specifically, sexual relations. The husband thereafter received compensation for his injuries pursuant to the provisions of the *Longshoremen's and Harbor Workers' Compensation Act*. Subsequently this action was filed by the wife. The court held (1) that a wife has cause of action for loss of consortium due to a negligent injury to her husband, and (2) that Section 5 of the Act does not bar such an action against the employer by the wife of a man injured under circumstances bringing him within the provisions of the Act. We shall limit this discussion to the second point. After quoting Section 905 of the Act the court reasons as follows:

"We would be less than candid if we did not admit that the plain and literal language of this section of the Act has such broad implications that it could be conceived to vitiate any right of action *flowing from* the compensable injury; but it is our considered opinion that such a broad interpretation was not and could not have been intended when the result would be such as to lead to the absurd and illogical consequence indicated in this case.

"But there can be no doubt but that this section is designed to make the employer's liability under this statute exclusive of any other liability either at law or in admiralty *to the injured employee or anyone suing in the employee's right*. But where a third person is suing in his or her own right on account of the breach of some independent duty owed them by the employer, even though the operative facts out of which this independent right and correlative duty arose are the same as those out of which the injured employee recovers under the act, the act does not proscribe the third person's cause of action. Thus, in a case where the employer had secured payment under the act to the injured employee and the employee thereafter brought an action against the third party, joint tort feasor, that party was allowed to implead the employer in order to get contribution. (Citing the Tampico, Supra, and language already quoted hereinabove) . . .

"*In this jurisdiction, the action for loss of consortium does not stand on subrogation but arises directly from the tort.* Thus, in *Lansburgh and Bros. v. Clark*, 127 Fed. (2d) *331*, where the husband joined in his wife's action for injuries sustained in the defendant's store, a jury verdict denying the wife recovery, but giving damages to the husband for loss of consortium was upheld, the court saying: 'In the prosecution of these separate and independent rights there is no privity, and a judgment against one is not a bar to an action by the other.'

"There can be no doubt, therefore, the injury to the consortium is an injury to a right which is independent of any right in the other spouse, and to which the defendant owes an independent duty. And in view of the fact that this appellant is suing in her own right for the breach of an independent duty owing her, we cannot say that the Act was designed to deprive her of her action.

"Moreover, it would be contrary to reason to hold that this act cuts off independent rights of third persons when the whole structure demonstrates that it is designed to compensate injured employees or persons suing in the employee's right on account of employment connected disability or death. It can hardly be said that it was intended to deprive third persons of independent causes of action where the Act does not even purport to compensate them for any loss. A brief examination of it will reveal that that there is no provision therein for compensating a spouse for the loss of consortium. As we have already pointed out, no distinction is made as between the amount of compensation payable to married and unmarried injured male claimants. Despite the fact that the latter was under a legal duty to support the

wife, and any impairment of the ability to perform that duty is a compensable element of damages, belonging to the wife where the husband has failed to recover therefor."

In view of the similarity of wording of the Longshoremen's and Harbor Workers' Compensation Act and the usual state Workmen's Compensation Act, the above decisions are of concern to the Workmen's Compensation Insurance Companies and to their counsel because of the trends and the reasoning indicated. The questions of coverage under the standard policy or under a particular endorsement will be discussed in a later paragraph.

Liability Where the Tort Is Governed by the State Law

The judiciary of the State of New York has evidently been the leader in getting away from the exclusive remedy theory of the Workmen's Compensation Law. The leading case in this particular area and that which is cited by other courts as authority to justify such a departure is the New York Court of Appeals decision in *Westchester Lighting Company vs. Westchester County Small Estates Corporation*, 15 NE (2d) 567. In that case the public utility corporation maintained a pipeline in a public highway for the conduct of gas to consumers. The defendant, while engaged in constructing a tile pipe drain under that highway, allegedly performed the work negligently so that the gas pipe was fractured and then encased within the tile pipe drain. Illuminating gas was thus permitted to escape into nearby houses resulting in injury to persons and property including the death of one John Havalon. For negligently failing to discover the escape of gas from its mains, the public utility corporation was held liable to those injured and sought to recover indemnity from the corporation alleged to be the primary wrong doer. This corporation, the defendant, had fully complied with the provisions of the Workmen's Compensation Law and contended that the plaintiff could not recover because of the exclusive remedy under the Workmen's Compensation Law. The court allowed the recovery. The court used the "independent duty or obligation" argument to justify this decision and the majority even went so far as to admit that the result of their decision was that an employer was made liable indirectly in an amount which could not be recovered directly.

> "This consequence, we think, does not decide the issue against the plaintiff. Recovery over against the employer in an unusual case like this need not be rested upon any theory of subrogation. An independent duty or obligation owed by the employer to the third party is a sufficient basis for the action. *Schubert vs. August Schubert Waggon Co.*, 249 NY 253, 164 NE 42, 64 A.L.R. 293."

Chief Justice Crane wrote a dissenting opinion in this case in which he took the position that what had been done in this case was in violation of the statute and a violation of the exclusive remedy theory. In other words, the representative of the estate received a large sum of money through a negligent action from the employer, merely because the money passed through the hands of the third party.

In the case of *Burris vs. American Chicle Company, et al*, 120 Federal (2d) 218, an employee was injured while washing the windows in a public building owned by American Chicle Company. Burris, the employee of Ashland Window and Housecleaning Company, had recovered compensation benefits under the New York Workmen's Compensation statutes. The owner of the building implead the employer for the amount of the judgment which it had to pay his injured employee, thereby causing the employer, according to the decision of this court, to pay both the compensation and the liability judgment. The court cited the Westchester case, supra, as authority, and ruled in the following language:

> "Neither is it of consequence on the question of the liability of Ashland to Chicle as indemnitor that the plaintiff was Ashland's employee, who was prevented from suing Ashland because their rights and duties were covered by the New York Workmen's Compensation law, Consol. Laws. C. 67."

This court made no comment as to whether the employer could take credit for the amount of compensation already paid.

In the case of *Baugh v. Rogers*, (California Supreme Court, 1944), 24 California (2d) 200, 148 Pacific (2d) 633, the plain-

tiff was engaged in household duties, specifically in aiding in window cleaning for her employer. While so engaged she was struck and injured by an automobile negligently operated by her employer, a Dr. Rogers. The automobile, however, was owned by another, a Mr. Warnock, and was being driven with his consent. After recovering under the Workmen's Compensation Law and the policy carried by her employer, the employee brought suit against the owner of the automobile. The owner, in turn, impleaded the employer of the plaintiff as a co-defendant. The court held that the owner of the automobile was responsible in damages and that the owner—bailor—of the automobile could recover from the employer, the driver of the automobile, the amount of the judgment less compensation already paid. In a dissenting opinion by Judge Traynor, in which Judge Curtis and Judge Edmonds concurred, the minority felt that the recovery violated the policy and provisions of the Workmen's Compensation Law. The court stated the following:

> "The conclusion is inevitable that the operator—employer—is not liable for damages either directly or indirectly. The question remains whether the owner can be held liable for damages to the employee regardless of the non-liability of the employer. It is my opinion that since the employer's liability is completely covered by the Workmen's Compensation Law, no liability on the part of the employer remains for which a third person can be liable."

In the three cases above discussed the employer is indirectly held liable to the employee for an amount which could not be recovered directly under the Workmen's Compensation Law. In other words, whether under a joint tort feasor, indemnity, or bailment theory, the exclusive remedy theory of the Workmen's Compensation Statutes is effectively abrogated.

Apparently, the numerical weight of authority, however, still defends and maintains the exclusive remedy theory (see list of authorities at Page 36, *Insurance Counsel Journal,* January, 1951). The cases in the following paragraphs support this view.

In the Minnesota case of *Breimhorst vs. Beckman,* 35 NW (2d) 719, a waitress in a restaurant was injured when in reaching for a towel she accidentally tripped the firing mechanism of a burglar spring gun, which had been more or less concealed by the employer, and constituted a trap. The court held there that the injury arose out of the employment, and that it was an accident under the Workmen's Compensation Act, since it was unexpected and unforeseen by the employee who sustained the injury. The court went on and described the element of malicious or deliberate intent required on the part of an employer with respect to an assault of his employee in order to give the injured employee the option of either suing for damages at common law, or proceeding under the Workmen's Compensation Act, as a conscious and deliberate intent directed to the purpose of inflicting an injury, and further stated that such intent may not be inferred from mere negligence, although it is gross.

In the Texas case of *West Texas Utilities Company vs. Renner,* Court of Civil Appeals, 1930, 32 SW 2d 264, and by the Commission of Appeals, 1932, 53 SW 2d 451, Renner sued the utilities company to recover damages for injuries sustained by him as an employee of Mosher Steel and Machinery Company while engaged in the erection of a building for the utilities company. Plaintiff received a charge of electricity when he came in contact with high voltage wires owned by the ulitities company and he alleged various grounds of negligence on the part of the utilities company. The utilities company impleaded Mosher, the employer, alleging the latter to be a joint wrong doer and tort feasor, and sought judgment over in case of Renner's recovery. The court used the two following grounds for its decision:

> "The right of contribution between joint tort feasors exists where one seeking the right is guilty of passive negligence, and the one against whom the right is sought is guilty of active negligence. Appellee, employer, Mosher Steel & Machinery Company was not charged by the pleadings or shown by any of the evidence to be guilty of any active negligence. Appellant, therefore, failed to plead or establish its right to contribution, even though it should be considered that the provisions of the Workmen's Compensation Law do not affect the rule. . . .
>
> "Further, appellee's employer duly protected himself against his own negligence (not amounting to gross negligence) by

providing compensation insurance for his employees, and could not be compelled to pay indirectly when no liability existed to pay directly. Appellant had no right of contribution against appellee's employer. It follows, therefore, that even if appellee had released his employer, such act deprived appellant of nothing."

The Commission of Appeals agreed with the above reasoning and upheld the exclusive remedy theory of the Workmen's Compensation Statute.

Generally speaking, the exclusive remedy theory has been upheld by a majority of the courts. However, the courts which have not upheld this theory, and their reasoning thereon, is of some concern to the insurance companies and to their counsel from the standpoint of defense, investigation, subrogation aspect, and of course, coverage and underwriting.

Coverage under Standard Workmen's Compensation Policy, Section I-B

If the various types of cases discussed above are to be included in the coverage under the standard Workmen's Compensation Policy, such coverage will be afforded either under Section I-B of the Policy, or under an endorsement. The pertinent portion of Section I-B of the Standard Policy reads as follows:

"To indemnify this employer against loss by reason of the liability imposed upon him by law for damages on account of such injuries to such of said employees as are legally employed, wherever such injuries may be sustained within the territorial limits of the United States of America, or the Dominion of Canada. . . ."

After the decision in the case of *Hitaffer vs. Argonne Company*, the National Bureau of Casualty Underwriters in a circular opinion to all companies gave its opinion as follows:

"Having received many inquiries as to whether or not the Standard Workmen's Compensation and Employers' Liability Policy provides coverage for such a claim, the Legal Committee of the National Counsel on Compensation Insurance reviewed this question. It was unanimously of the opinion that the policy provides coverage for the liability imposed upon the employer for this type of case (under Paragraph I-B)."

In order to clarify for your thinking the various parties and the actions involved in this third party situation, a hypothetical fact situation is attached to this report.

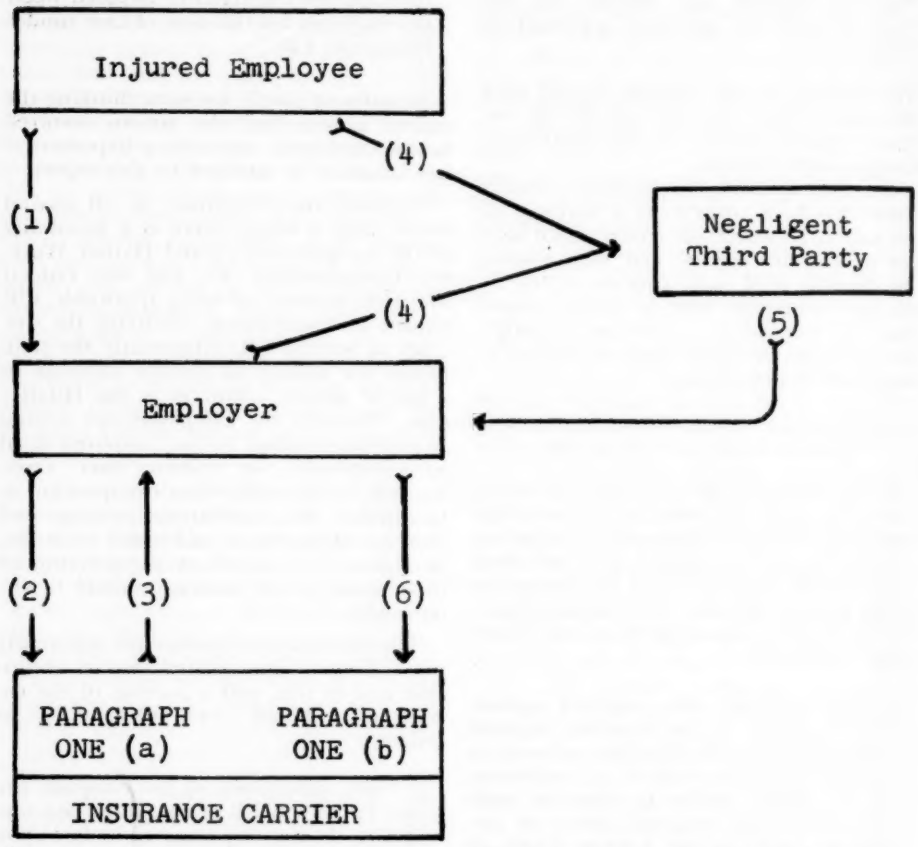
Probably the companies in all coastal States, that is where there is a possibility of the Longshoremen's and Harbor Workers' Compensation Act and the Federal Maritime jurisdiction being applicable, will require an endorsement clarifying the coverage of Section I-B. Apparently the companies are willing to provide coverage in a loss of service action as in the Hitaffer case. Probably the companies are willing to provide coverage in the "employee-third party-employer", or "liability over" cases. In each of these situations the question as to whether this is additional coverage and therefore warrants an additional premium, or whether it is merely an interpretation of the present policy coverage should be determined.

The insurance companies are apparently not willing to assume any contract obligation and to that end a portion of the endorsement should read substantially as follows:

"The obligations of the company under Paragraph I-B of the Policy are limited to the liability imposed by law upon this employer for negligence, but specifically exclude any liability assumed by this employer under any contract entered into with any other person, association, or organization."

If the particular insurance carrier wishes to cover this contractual liability, an appropriate endorsement can be added to the public liability policy, specifically setting forth contractual obligations covered.

DIAGRAM: Showing parties and sequence of actions involved in connection with Insurance of the liability imposed upon an Employer by reason of a suit or claim brought against him by a Third Party to recover the amount of damages obtained from such Third Party on account of injury or death of an employee of the Employer in connection with which Compensation or Medical Benefits have been paid under the Longshoremen's Compensation Act.



Courtesy of Walton O. Head, General Counsel and G. W. Greathouse, Vice-President, Employers Casualty Insurance Company, Dallas, Texas.

EXPLANATION OF DIAGRAM

(1) Liability of Employer to Employee for compensation and medical benefits under Longshoremen's Act in the amount of $5,000.00.

(2) Liability of Insurance Carrier under Paragraph One (a) of the compensation policy to pay to Employee on behalf of Employer compensation and medical benefits referred to in (1) above.

(3) Insurance Carrier subrogated to rights of Employer against Third Party to extent of Employer's liability to Employee for compensation and medical benefits. See Sec. 33 (i), Longshoremen's Act.

(4) Liability in admiralty of Third Party to Employee and Employer for damages in the amount of $40,000.00. If compensation and medical benefits referred to in Paragraph (2) above were established by an award of the Deputy Commissioner, the suit against the Third Party is brought by the Insurance Carrier in its own name or in the name of the Employer for the joint use of itself and the Employee. See Sec. 33, Longshoremen's Act, also, *Moore v. Hechinger,* 127 Fed. (2d) 746. If the com-

pensation and medical benefits referred to in (2) above were paid without an award, the suit against the Third Party is brought by the Employee, but the Insurance Carrier has such interest in the proceeds of the recovery that it is entitled to become a party plaintiff in the suit for the purpose of asserting its right to recover the moneys paid by it on behalf of the Employer under Paragraph One (a) of its policy. See *The Aetna*, 138 Fed. (2d) 37. Regardless of the manner in which the suit against the Third Party is brought, the $40,000.00 damages will be apportioned $35,000.00 to the Employee and $5,000.00 to the Insurance Carrier. However, under certain circumstances, recovery by the Insurance Carrier of its $5,000.00 is subject to being defeated by right of offset as shown in Paragraph (5) below.

(5) Liability of Employer to Third Party for contribution or indemnity. If contribution is recovered the amount is 50% of the Third Party's damages; if indemnity, the amount is 100%. This action for contribution or indemnity may be asserted either as an action over in the suit referred to in Paragraph (4) above, or as a separate suit instituted after the conclusion of the suit referred to in Paragraph (4) above. In the latter instance, no question concerning the right of offset arises, and the judgment against the Employer in favor of the Third Party would be $20,000.00, if for contribution, and $40,000.00 if for indemnity. However, where the action for contribution or indemnity is asserted as an action over and tried as a part of the suit referred to in Paragraph (4) above, there is some authority indicating that the Insurance Carrier's recoupment claim for $5,000.00 can be offset against a corresponding amount of contribution or indemnity recovered by the Third Party against the Employer. In this event the judgment against the Employer in favor of the Third Party would be $15,000.00 if for contribution, and $35,000.00 if for indemnity; the judgment insofar as the Insurance Carrier is concerned would be that it recover nothing against the Third Party. On the question of the right of offset, see *Coal Operators Casualty Co. v. United States*, 76 Fed. Supp. 681.

(6) Liability of Insurance Carrier to Employer under Paragraph One (b) of the Policy as extended to indemnify against the claim of the Third Party up to a limit of $25,000.00. If, in the action referred to in Paragraph (5) above, the recovery was for indemnity, the $25,000.00 limit would apply in the following manner:

(a) In the instance, discussed in Paragraph (5) above, where no right of offset was involved, the judgment against the Employer in favor of the Third Party in the amount of $40,000.00 would be the sum to be applied against the $25,000.00 limit notwithstanding that the Insurance Carrier had recovered from the Third Party the sum of $5,000.00 in the suit described in Paragraph (4) above. The right of the Insurance Carrier to recover the $5,000.00 from the Third Party is a right arising in connection with the obligation under Paragraph One (a) of the policy and should affect in no way the limits of liability imposed under Paragraph One (b) of the policy, as extended, since the two paragraphs in question represent separate and distinct undertakings on the part of the Insurance Carrier. Therefore, in this instance, the liability of the Employer to the extent of $15,000.00 would be uninsured.

(b) In the instance, discussed in Paragraph (5) above, where the Insurance Carrier's recoupment claim for $5,000.00 is offset against the Employer's liability to the Third Party for indemnity so as to reduce the same from $40,000.00 to $35,000.00, the sum to be applied against the $25,000.00 limit would still be $40,000.00, the same as in sub-paragraph (a) above. Although, in this instance, the Third Party recovers only the sum of $35,000.00 indemnity against the Employer, the total liability of the Employer to the Third Party was $40,000.00. The recovery was reduced from $40,000.00 to $35,000.00 by reason of the offset of $5,000.00 which, as between the Insurance Carrier and the Employer, belonged to the former rather than the latter. The Insurance Carrier's right to recover the $5,000.00 arises in connection with Paragraph One (a) of the policy and is given by express provisions of the Longshoremen's Act. The liability to pay the $40,000.00 is one imposed by the maritime law, and, according to the prevailing view in the Federal Courts, is one which is entirely apart from and unaffected by the Longshoremen's Act. For this reason, the $5,000.00 which was used to discharge a part of the Employer's liability should be added to the remaining $35,000.00 liability of the Employer to arrive at a

total of $40,000.00 as the full amount of the liability against which the $25,000.00 limits of liability apply as between the Employer and the Insurance Carrier. Otherwise stated, the application of the Insurance Carrier's $5,000.00 toward discharge of the Employer's total liability of $40,000.00 to the Third Party also constitutes application of $5,000.00 towards discharge of the Carrier's agreement with the Employer to indemnify him up to $25,000.00. Thus, the extent of the Insurance Carrier's indemnity obligation as respects the $35,000.00 judgment against the Employer in favor of the Third Party is only $20,000.00. Under either method of approach, again the liability of the Employer to the extent of $15,000.00 would be uninsured.

If, in the action referred to in Paragraph (5) above, the recovery was for contribution rather than indemnity, such recovery to the extent of $20,000.00 would be applied against the $25,000.00 limit of liability, and the loss would be $5,000.00 short of consuming the limit of liability. The result would be the same regardless of whether or not the Third Party may have been allowed the right of offset as described above. The same principles would apply in the case of contribution as stated above in connection with indemnity, but in the present example, the application of these principles need not be discussed in further detail, since the amount involved from the standpoint of contribution is less than the limits of liability assumed for the purpose of the example.

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Liability of Insurance Companies for Payment of Judgments In Ohio

P. L. Thornbury
Columbus, Ohio

In Ohio the liability of a casualty insurance company for the payment of judgments is covered by G. C. Sec. 9510-3 and -4. The first section provides in substance that under a contract of insurance insuring against loss or damage on account of the bodily injury or death by accident of any person for which loss or damage the insured is responsible, whenever a loss or damage occurs on account of a casualty covered by such contract of insurance the liability of the insurance company shall become absolute and the payment of the loss shall not depend upon the satisfaction by the insured of a final judgment against him for loss or damage or death occasioned by such casualty; that no such contract of insurance shall be cancelled or annulled by any agreement between the company and the insured after the insured has become responsible for such loss or damage or death. The second section covers when the insurance money shall be applied to judgment and provides in substance that upon the recovery of a *final judgment* against the insured by any person, including administrators and executors, for loss or damage on account of bodily injury or death, for loss or damage to tangible or intangible property, for loss or damage to a person on account of bodily injury to his wife, minor child or children, if the defendant in such action was insured against loss or damage at the time when the rights of action arose, the judgment creditor or his successor in interest shall be entitled to have the insurance money provided for in the contract of insurance between the in-

surance company and the insured applied to the satisfaction of the judgment and if not satisfied within 30 days after the date when it is rendered the judgment creditor, or his successors in interest, may file in the action in which said judgment was rendered a supplemental petition wherein the insurance company is made a new party defendant in said action and whereon service of summons upon the insurance company shall be made and rendered as in the commencement of an action at law. Thereafter the action shall proceed as to the insurance company as in an original action at law.

It is to be noted that under Section 9510-3 the loss or damage must be covered by the contract of insurance and that the insured must be responsible for such loss or damage and under Section 9510-4 if the insurance company does not pay within 30 days after recovery of a final judgment against the insured the judgment creditor may then file a supplemental action in the original tort case to apply the insurance money provided in the insurance contract toward the satisfaction of the judgment.

The principal difficulty which has led to the great volume of litigation of these two sections grows out of the question as to whether the loss is covered by the policy and the insured is liable for such loss and when a judgment becomes final against the insured. The insurance contract states the terms and conditions upon which the loss is covered and it is these terms and conditions which have led to most of the questions found in the cases construing the sections referred to.

Before getting into specific cases it would be well to make some general observations. Ohio follows the bad faith rule in determining whether or not the company is liable for only the policy limits toward the satisfaction of the judgment or whether it is liable for the amount of the judgment in excess of the policy limits. This phase of our subject alone would require as much time as we have allotted and for this reason we will not go into the cases dealing with this subject other than to state the general rule. Under this rule, in the absence of fraud or bad faith, the obligation of the insurer to settle is not mandatory and liability cannot be predicated on the fact that the insurance company elected to defend rather than settle. Likewise, it will be impossible to discuss in detail the terms and conditions of the standard automobile policy which is the basis of most of the litigation of these sections as that likewise is a subject in itself.

Under these sections the liability of the company on account of a casualty covered by the contract becomes absolute only in the sense that the payment of loss by the company shall not depend upon the satisfaction by the insured of a final judgment against him and the benefits of the sections are limited to persons who suffer bodily injury as the result of the negligence of the insured. Although the Nadler case held that a husband could not maintain an action against the company to recover damages for the loss of the services of his wife resulting from her bodily injury caused by the negligence of the insured, nevertheless there would be coverage for the loss of such services under the present standard automobile policy to the extent that the total judgments for the injuries sustained by the wife and for loss of her services do not exceed the policy limits for injuries sustained by one person in one accident. These sections do not create the relationship of co-sureties between separate and independent sureties. The statute deals with indemnifying insurance companies separately and not jointly, each being made responsible for the payment of the judgment. *Stacey v. Fidelity and Casualty Company,* 114 O. S. 633, 151 N. E. 718; *New Amsterdam Casualty Company v. Nadler,* 115 O. S. 472; 154 N. E. 736; *United States Casualty Company v. Indemnity Insurance Company of North America,* 129 O. S. 391, 195 N. E. 850.

The purpose of these sections is to afford an injured person direct and prompt benefit of the provisions of the insurance policy but he succeeds to only the rights of the insured and cannot recover in an action on the policy if there has been such a breach of the contract by the insured as would prevent recovery by him. *Luntz v. Stern,* 135 O. S. 225, 20 N. E. 2d 241.

An oral contract of insurance is as binding as a written one under these sections if the oral contract is established as existing prior to the accident. *Goodman v. Royal Indemnity Company,* 24 App. 357, 157 N. E. 311. The sections do not apply to insurance for property damage. *State Automobile Mutual Insurance Company v. Columbus Motor Express,* 15 Abs 747.

The company may assert in the supplemental proceeding any policy defense it may have but any factual situation relating to such defense upon which reasonable minds might reach different conclusions

must be submitted to the jury under proper instructions and failure to do so would be reversible error. *Hickman v. Ohio State Life Insurance Company,* 92 O. S. 87, 110 N. E. 542; *State Automobile Mutual Insurance Association v. Lind,* 122 O. S. 500, 172 N. E. 361; *Hendershot v. Ferkel; Motorists Mutual Insurance Company,* 147 O. S. 111, 68 N. E. 2d 67.

The person injured by the insured in such manner as to entitle the insured to indemnity under the policy has such potential beneficial interest in the policy by the provisions of Section 9510-4 as to warrant such injured person to comply with the terms and conditions of the policy even though such performance be without the knowledge or concurrence of the insured and a waiver to such injured party is equivalent to a waiver to the insured. *Hartford Accident and Indemnity Company v. Randall,* 125 O. S. 581, 183 N. E. 433. This is a very valuable right which attorneys for plaintiffs should remember. You have the right, for example, to give notice to the company of the suit on behalf of your injured client and such notice will be sufficient provided it is given timely and even though the insured does not notify the company. I received a letter from a lawyer last week from Virginia, in which he stated that our insured had had an accident in which a suit had been filed against the insured for $10,000.00; that the insured had retained him to defend the case which he had done and had obtained a defense verdict. The attorney was requesting the company to pay his fee and reimburse the insured for expenses incurred in the defense of the case. The company had received no notice of the suit although it had received notice of the accident when it first occurred. If you were counsel for the insurance company, what would you do under such circumstances? It is obvious that under the terms of the policy the company should have no liability by reason of the lack of notice of the suit and the assumption of the defense of the case by the insured without consulting the company. However, in this case, as in many cases involving good public relations we wrote the attorney and suggested that he let us have the amount of his fee and the costs incurred and if they are within reasonable limits the company will no doubt pay them.

At this point I would like to digress a few minutes to comment upon the public relations involved in handling cases involving denial of liability by reason of the policy provisions as it has a very direct bearing upon the insurance industry as a whole and you as an insured who must pay the losses of insurance companies by way of premiums. Because as sure as death and taxes insurance companies charge a rate sufficient to pay losses and you pay the rates or premium. It has been my opinion that denial of liability by reason of so-called "technical violations" of the terms and provisions of the insurance contract should not be made as too many such cases lead to a demand on the part of the public for the type of insurance legislation which is bad both for the industry and you and me as policyholders. The fewer cases where plaintiffs are not paid for injuries sustained, the less likelihood there is of a demand for bad legislation. At any rate those of us that represent insurance companies should go slow in denying liability under insurance contracts and should make every effort to work out a settlement of policy cases rather than arbitrarily go to trial and show someone that it is possible to win a suit on a policy.

There is a growing public demand that injured persons be paid for their injuries especially in automobile cases where there is liability. For example, we have had introduced in the present state legislature a whole raft of insurance bills, some of which, if enacted into law will not in final analysis solve this problem but will greatly increase the cost of insurance as witness the bill to adopt a compulsory insurance law and Senate bill No. 107 which adds supplemental sections 9510-4a and 4b. 4a provides that the judgment creditor mentioned in 9510-4 may recover the amount of the judgment over and above the face value of the policy held by the insured in any case where it can be established that an offer was made to release the insured from liability in consideration of payment by the insurance company of an amount equal to or less than the face value of the policy and such offer was rejected by the insurance company without the consent or approval of the insured. 4b provides that if the judgment creditor does not file the supplemental action then the insured against whom the judgment was taken may file an action to recover the amount of the judgment over and above the face value of the policy and recovery shall be allowed in any case where it can be established that an offer was made to release the insured

from liability in consideration of payment by the insurance company of an amount equal to or less than the face value of the policy and such offer was rejected by the insurance company without the consent or approval of the insured. This bill has been passed by the Ohio Senate and is now pending in the House of Representatives. Those of you who represent insurance companies are well aware of the dangers involved in this legislation.

I might also state for whatever it may be worth that it has been the policy of the speaker to defend all cases involving the violation of policy provisions under a reservation of rights and make every effort to dispose of them without going to trial with the exception of the case where the insured is guilty of fraud or a willful intent on the part of the insured to violate the terms of the policy. For example in one of our cases the insured deliberately ran down his wife after she had spent an evening at a beer parlor. In another case the insured deliberately misrepresented the facts surrounding the accident in an effort to make himself liable for the injuries of members of his family who were passengers in his car. In another case the insured ran over his next door neighbor on a very dark night when it was raining, as he was blinded by the lights of an oncoming car and his friend happened to be walking on the insured's right hand side of the road at that particular moment. The insured not only did not report the accident immediately but during the course of the next two months made offers of settlement up to $5,000.00 for a broken leg which should have been settled in the first place for not more than $2500.00. We learned of the accident when suit was filed about four months later. We, nevertheless, defended the case under a reservation of rights and during the course of events the case was finally settled for $2500.00. We handled the case because of the equities involved and this was the first accident the insured had ever had (He was scared to death. Someone told him he was going to be put in jail, that he would lose his farm) and we finally did learn of the case when a proper investigation could still be made and witnesses were available.

Handling cases of coverage is at times fun, entertainment, educational and pathetic. To be a good juggler of such cases you have to be a soothsayer, clairvoyant, astrologer and jack-of-all-trades.

I received quite an education in a few cases. Quite a number of years ago I appeared with local counsel to argue a case in the Court of Appeals of a certain state. We had denied liability in a case where a father and son had gone to that state to attend a funeral. After the funeral the father said he wanted to visit a few friends and told his 18-year-old son to wait for him at the hotel. Instead the son got in the car, went out and got a boy friend of his and proceeded to a string of beer joints. About 2:00 A.M. they poured our boy into the back seat completely out and his boy friend who could still manage to sit up, got behind the wheel and started down the highway. He drove just exactly 1/4 of a mile when he went directly across the highway and head on into an oncoming car which was on its right side of the road, injuring two women in the car. We defended under a reservation of rights on the ground the driver did not have permission to drive the car and tried to settle the case for medical expenses but couldn't do so and went to trial with a verdict being rendered against the company. During the course of my argument, the presiding judge leaned over and inquired of our local counsel whether or not the premium had been paid in this case and upon being advised that it had, he settled back with a satisfied expression on his face. As soon as the argument had been completed and we reached the corridor of the court room I turned to opposing counsel and said, "We will give you $1000.00 to settle the case." He accepted it and afterwards local counsel said, "You made a wise move in settling this case because down here the courts are inclined to decide direct suits on the basis of whether or not the premium has been paid."

I had a rare experience trying a case before his Honor Judge Howe, U. S. judge for the district of Vermont. Judge Howe was a Democrat and had been appointed to the bench by President Wilson and during the course of his reign on the bench he really made it interesting for the insurance companies. In this particular case in the original personal injury suit his final parting words to the jury were, "Now, if you are going to find for the plaintiff, make it worth his while," and the jury obeyed instructions by rendering a judgment for $12,000.00 as damages growing out of a wrongful death of a laborer. A direct suit was filed against the company growing out of the fact that the additional insured had insurance with another com-

pany covering him while driving any automobile in the state of Vermont and we contended our policy did not apply as the additional insured clause at that time provided that in such case the additional insured would not be covered under the policy. We proceeded to trial in the direct suit and at various stages it would seem that we were entitled to a directed verdict but each time Judge Howe would suggest that we recess and adjourn to the library to see if there wasn't some way, "We could hold this insurance company liable." After the third or fourth excursion to the library he finally permitted the plaintiff to virtually reform his entire case including the parties plaintiff and defendant with the final result that he thought he could safely find for the administrator against the company, which he did, (*Farm Bureau v. Violano,* 123 Fed. (2d) 692) but the good judge did hold we did not have to pay in excess of policy limits as we had acted in good faith in refusing to settle the case.

In another case, after several years of litigation in the State and Federal courts we finally wound up with a decision to the effect that if an insurance company desired to exclude fraud and misrepresentation by the driver of a car in favor of injured members of his family that the company should put such an exclusion in its policy. In this case right after the accident the insured had told our adjuster that as he approached a curve in the highway the other car came directly across the highway and hit him head on when his right wheels were near the curb on his right side of the road. Later on he wanted to know whether the company was going to pay the expenses of the members of his family who were in his car and when we told him there was no liability on his part for such injuries he then proceeded to change his story of the accident and at the time of trial said that he turned to his left, or wrong side of the road just before the accident, why, he didn't know, and that the collision took place when he was astride the center line of the highway. We decided to litigate this one to our sorrow with the decision just referred to.

Getting back to Ohio we find an insurance company may show as a defense that the judgment which is the foundation of the judgment creditor's action is void but in the absence of fraud, the invalidity of the judgment must appear from the record of the court in the case wherein the judgment was rendered and evidence contradicting such record is incompetent. *Hendershot v. Ferkel; Motorists Mut. Ins. Co.*. 144 O. S. 112, 56 N. E. (2d) 205.

There is no liability on the part of the insurance company under the present automobile casualty policy where the insured is liable by reason of his willful misconduct. However, I would suggest you make sure that the evidence in the injury case on which the judgment is based shows willful misconduct, otherwise you might lose the direct suit based on denial of coverage by reason of willful misconduct. *Rothman v. Metropolitan Casualty Insurance Company,* 134 O. S. 241, 16 N. E. (2d) 417; *Commonwealth Casualty Company v. Headers,* 118 O. S. 429.

Where the insured fails to cooperate, or is guilty of fraud in obtaining the insurance policy, or the additional insured does not have permission of the named insured to use the car at the time of the accident, or there is a failure to properly notify the company of the accident or suit, or where the insured fails to comply with any of the other material terms and provisions of the insurance contract, then the judgment creditor cannot recover against the company under the policy as his rights can never be greater than those of the insured. See *Venditti v. Mucciaroni,* 54 App. 513, 8 N. E. (2d) 460; *Miller v. Jones,* 140 O. S. 408, 45 N. E. (2d) 106; *Basmajain v. State Automobile Mutual Insurance Company,* 142 O. S. 483, 52 N. E. (2d) 985; *Baily v. Weaver,* 67 App. 259, 35 N. E. (2d) 1006; *Conold v. Stern,* 138 O. S. 352, 35 N. E. (2d) 133; *Luntz v. Stern,* 135 O. S. 225, 20 N. E. (2d) 241; *Metropolitan Casualty Insurance Company v. McPherson,* 21 Abs. 300; *Stacey v. Fidelity & Cas. Co.,* 114 O. S. 633, 151 N. E. 718; *Storer v. Ocean Accident & Guaranty Corporation,* 80 Fed. (2d) 470.

Failure of the judgment creditor to file suit within two years after final judgment as required by limitation clause of the policy is a bar to recovery against the insurance company under the policy. *Hyman v. Maryland Casualty Company,* 37 Abs. 589, 45 N. E. (2d) 478.

To sustain the defense of lack of cooperation, on the ground that there was a variance between statements and information given by the insured to the insurance company before trial and the insured's testimony at time of trial, such variance must be conscious on the part of the insured as well as material and substantial. *Ocean*

Accident & Guaranty Corporation v. Lucas, 74 Fed. (2d) 115.

An insurance company may defend the personal injury action under a reservation of rights without waiving its right to assert a policy defense in a subsequent supplemental proceeding but this is a tricky matter and counsel should proceed cautiously. For example, he should advise the insured in writing of the reservation of rights, that he has the right to employ personal counsel at his expense and that the defense provided under the policy shall not be deemed a waiver of any policy defense. If you do not want to proceed under a reservation of rights then if a suit is threatened or has been filed you can proceed to test the policy defense by filing a declaratory judgment action. *Myers v. Ocean Accident & Guaranty Corp.. Ltd.,* 99 Fed. (2d) 485; *Hartford Accident and Indemnity Company v. Randall,* 125 O. S. 581, 183 N. E. 433; *Home Indemnity Company v. Village of Plymouth,* 146 O. S. 96.

While the word subrogation does not appear in section 9510-4 the section clearly involves the principle of subrogation. *Hartford Accident & Indemnity Company v. Randall,* 125 O. S. 581, 183 N. E. 433. The rights of the subrogee of the insured party, however, can be no greater than those of the insured and the policy proceeds can be applied to a judgment only when a final judgment has been entered against the insured. *Builders & Manufacturers Mutual Casualty Company v. Preferred Automobile Insurance Company,* 118 Fed. (2d) 118, affirming 26 F. Supp. 968, where it was held that there is no necessity for invoking section 9510-4 when plaintiffs in a tort action have been paid and a release has been procured in advance of judgment since there can be no successor in interest after the claims have been satisfied. *Builders and Manufacturers Mutual Casualty Company v. Hummon,* 26 Fed. Supp. 929. Affirmed 118 Fed. (2d) 118. This case also held that the words "or his successor in interest" in this section refer to "successor in interest" of the injured party; and that in order to be in conformity with the provisions of the section the action should be by way of supplemental petition against the insurance company filed in the original damage suits.

Where plaintiff recovers a judgment for personal injuries and files a separate action against the insurance company instead of filing under section 9510-4 a supplemental petition in the original suit, such separate action is subject to a demurrer. *Gruelich v. Monnin,* 37 Abs. 27, 45 N. E. (2d) 212.

It has also been held that these sections under discussion do not give the holder of a final judgment for bodily injury a secured claim against a bankrupt to the extent that the bankrupt was insured and thereby deprive the judgment creditor of the right to file a claim for the face amount of the judgment. See also 95 Fed. (2d) 961. An interesting case dealing with bankruptcy is *Gross Galesburg Co. v. Ingalls, Jr.,* 136 O. S. 450, 26 N. E. (2d) 440. In this case it was held that in order for the insurance money mentioned in section 9510-4 to be available to a judgment creditor the judgment must have been secured against a defendant who was insured against loss or damage by the insurance company from whom payment is sought and therefore a judgment secured against a trustee in bankruptcy of the insured does not satisfy the requirements of the statute.

In cases where there are several persons injured in one car a question arises as to how many times the liability of the company under the policy must be litigated where several plaintiffs get judgments against the insured growing out of the accident. The Wright case held that where the insured and insurer were in reality the adversaries on the controlling issue as to whether the insurance policy was in force at the time of plaintiff's injury and such issue is in fact litigated and finally determined, it is res judicata as between insured and insurer in any subsequent action wherein the insured and the insurer are again aligned as adverse parties on such issue. *Wright v. Schick,* 134 O. S. 193, 16 N. E. (2d) 321. The *Conold Case* held that a judgment in favor of the insurance company on the question of coverage in the first passenger's case was a bar to recovery in a second passenger's case even though the plaintiffs were different judgment creditors, as the real parties on the question of coverage were the insured and the insurance company. *Conold v. Stern,* 138 O. S. 352, 35 N. E. (2d) 133.

Cases Requiring Special Handling

There are usually four types of coverage cases which plague home office and local counsel for insurance companies. They are:

(1) *Where the claim is clearly excluded under the terms of the policy.* For example, an insured fails to report an accident

and just before the two-year statute of limitations for actions on personal injuries expires, suit is filed by a claimant and the insured readily admits that he did not notify the company. Usually this type of case can be ended by merely writing a letter to attorney for plaintiff and the insured denying coverage, but even this type of case needs watching. A few years ago we had a case reported where it was stated that the driver was 16 years of age. We were told by a witness that the driver was only 13 years of age. A birth certificate showed the driver was only 13 years of age and we denied coverage as the policy then excluded all drivers under 14 years of age. Plaintiff had originally only sued the son and thereupon responded by filing suit against both the father and the son as the family purpose doctrine was in effect in the state involved. We then began to get suspicious of the situation and decided to defend under a reservation of rights which was served upon the father and son by the sheriff of the county involved as the father would not sign such an agreement and we proceeded to make a complete investigation of the accident which showed that the son had made a left turn in front of an approaching car which was being driven by a former police chief of the city where the case was tried. At this point I would like to observe that you should never make a complete investigation or accept the defense of a case in which there is a question of coverage involved, except under a written reservation of rights, either signed by the parties involved or contained in a letter to the insured and his driver, if a person other than the named insured is driving, because if you do so then you will be faced with the claim of waiver in any subsequent direct action against the company on the policy growing out of the tort case. When we assembled to try the personal injury case an individual came to our local counsel and told him that he had heard that plaintiff was going to claim that the father had grabbed the wheel and was actually driving the car at the time of the collision, whereupon we asked for a continuance and proceeded to file a declaratory judgment action. To make a long story short, the father died before either case was tried and the personal injury died with him, as the case was in a common law state and we finally settled the case against the son for $500 to get the matter concluded. Because of our experience in this case, we adopted the general policy of defending all cases of coverage under a reservation of rights even though it appears clear that the accident is not covered by the terms of the policy.

(2) *Where there is some doubt as to coverage.* Upon the question of coverage arising, we immediately proceed under a reservation of rights to make a complete investigation of the case. If the investigation discloses a questionable case of coverage, we then notify the insured that there is a question as to coverage and that he has the right to employ personal counsel at his own expense if he so desires. If suit is filed, we then again notify the insured that we are defending the case under a reservation of rights and that the attorneys who will defend his policy interests will be glad to cooperate with his personal attorney, if he cares to employ one at his own expense. If the tort case results in a final judgment against the insured, we then decide whether to pay the judgment or submit to a direct suit on the policy.

(3) *Two policies covering the same accident.* This situation often arises where a motor vehicle accident occurs on the insured's premises covered by a general liability policy in one company and the motor vehicle is covered in another company. The books are full of cases as to which company covers the accident and why. Usually the general liability policy excludes all claims growing out of the operation of motor vehicles and the automobile policy provides that if there is any other coverage, the loss shall be prorated. Sometimes one or both of the companies will refuse to defend the claim or one of the companies will defend and if plaintiff recovers a final judgment will then file suit against the other company for their alleged share of the judgment. Because of the unusual results of such litigation, I would suggest that you proceed on the basis that your company may be on the risk and that you proceed with caution. We follow the practice of defending such cases and under a reservation of rights, if there is a question as to our coverage. If the other company has refused to come in with us on the defense of the case, we keep the other company advised of all developments and maintain throughout our position that we will expect them to pay their pro rata share of any judgment or settlement. If after the matter is concluded and the other company refuses to pay their share of the loss, we then file

suit if it is a case where both companies have liability under their policy.

(4) *Where one company insures both cars.* This is fast becoming one of the most troublesome problems which will confront you as local counsel for insurance companies, due to the fact that it is becoming rather common for one company to have coverage on both cars involved in an accident, as there are now about 75 out of every 100 cars on the highway insured, as compared to only about 30 out of 100 prior to the amendment a few years ago to our financial responsibility law. We have had a fairly large number of this type of case and I would recommend the following procedure to you. We make as complete and impartial an investigation as is possible in an effort to determine the question of liability. If the investigation shows that one insured is liable, we then pay the claims of the insured not at fault and deny liability to the insured at fault. If a suit is then filed by the insured at fault, we then proceed to defend the case in the usual manner. However, where you cannot make a reasonable settlement with the insured not at fault, or you cannot reasonably conclude that either insured is primarily at fault, or you conclude that neither of the insureds should recover from the other, then you really have trouble on your hands, as usually one files suit and the other cross petitions. We have taken the position where one files suit and the other files a cross petition that we owe a defense to both and proceed to furnish counsel to each to defend their respective policy interests with the understanding that we will not be liable for any counsel fees of their respective personal attorneys prosecuting their respective claims for injuries. In these cases we have instructed our attorneys to make a complete investigation of the case on behalf of the insured being represented and to defend it as if we had only that insured covered in the accident. The great majority of these cases are usually settled, but once in a while one goes through trial and after we have paid off the judgment of the winner, we have heard nothing further from the case.

From these comments as to special handling we may draw the following conclusions:

1. If there is no question whatever about the facts upon which to disclaim coverage and if they are established beyond the possibility of change and the case is plainly one of non-coverage, then you may disclaim and await the direct suit if one is filed.

2. If there is any doubt as to coverage, or the facts relating to coverage are in dispute, or there is a possibility of a change in the facts, or if the allegations of the petition in the personal injury case make a prima facie case of coverage, then do not make an outright disclaimer, but defend under a non-waiver agreement or a letter of reservation of rights.

3. If the accident is covered by two policies, proceed with extreme caution, brief the cases on the question of coverage involved and then take such action as the cases indicate. If the question of coverage is at all doubtful, proceed only under a non-waiver agreement or a letter of reservation of rights and do not disclaim or refuse to defend.

4. If both cars involved in an accident are covered by the same insurer, make a complete and impartial investigation in an endeavor to determine the insured at fault. If it can be reasonably determined that one is at fault and the other is not at fault, make every effort to settle with the insured not at fault and then defend any suit filed by the insured at fault. If the question of negligence of both parties is in doubt and you cannot settle with either party and both file suit or one sues and the other cross petitions, furnish a defense for both insureds with respect to their policy interests with instructions to each set of attorneys that they make a separate, independent investigation of the case as to the client being represented and that each set of attorneys shall act independently of the other. If possible, get an agreement that you will not be liable for services rendered by insured's personal attorney representing the insured's personal injury claim, but if you cannot, then write each insured and his attorney stating your position and maintain this position throughout the case. Never select the insured's personal attorney to defend the insured's policy interests.

If the insured and his personal attorney refuse to permit you to furnish a defense as to his policy interests, then offer to fulfill the requirements of the contract in this regard and keep your offer of performance in force throughout the period of litigation, so that after it is concluded and if you are sued for services and expenses of defense under the policy, you can show your offer and willingness to perform the terms of the contract, but that you were prevented from doing so by the insured.

Under these circumstances, it would seem that the court should sustain you in your position that you are not liable for such services and expenses and especially in view of the fact that the services rendered are the same which would have been rendered in the attorney's prosecution of the insured's personal injury claim and that the services rendered were, in fact, rendered on behalf of the insured's personal injury claim and not by way of defending the policy interests of the insured involved in any cross action. I would advise that you construct your route well in such a case because undoubtedly you are headed for the Supreme Court in view of the uncertain situation existing with reference to such matters, since the decision of the Ohio Supreme Court in the case of *Sacony Vacuum Oil Co. v. Continental Casualty Co.*, 144 O. S. 382.

Liability for Judgments in Excess of Policy Limits

I have already pointed out that Ohio follows the bad faith rule and that the company is not required to settle within its policy limits at its peril in the absence of fraud or bad faith. I have also outlined Senate Bill 107 which would require the insurance company to pay a judgment in excess of policy limits if the company fails to make a settlement within such limits without the consent of the insured. Inasmuch as this Bill has not become law we can only discuss the law on this subject as it now exists in Ohio. While the general rule just stated appears simple and should not give particular trouble I would suggest however that there are numerous pitfalls in operating under the rule and would like to make some suggestions in handling cases where the amount asked for exceeds policy limits. In the first place you should always advise the insured in writing that he has been sued in excess of his policy limits, that he has the right to obtain personal counsel at his expense and that the attorneys selected by the company to defend his policy interest will be glad to cooperate with his personal attorney.

In the second place I would suggest that you make a careful investigation of the facts, the injuries involved and carefully prepare your defense of the case; that you make known these facts to the insured and his personal attorney if he has one, so that they are fully informed at all times.

You should also conduct settlement negotiations carefully so as not to involve any waiver of policy limits by doing such foolish things as saying that you will pay $3500 of your $5000 limit if the insured will pay the remaining $1500 of a proposed $5000 settlement where the injuries and liability are bad. You must live up to your contract obligations and if it requires payment of the entire policy limit to effect settlement and good judgment indicates the case is worth policy limits for settlement it is your duty to pay the policy limits by way of settlement. Any other action on your part is a plain dereliction of duty to your client, in my opinion. Don't ever make the statement that your company will not pay its policy limits in any case, however bad, unless you want to pay the entire judgment which very often exceeds policy limits.

We had a case at Greenville where the injuries were bad, and the liability clear, and we had only a $5000 policy. The insured had a farm, completely paid for and worth several times the amount of his insurance. We made every effort to settle the case within our limit but without success. We finally got an offer of settlement of $6500 and took the matter up with the insured and his attorney and urged them to accept it as we were of the opinion that the judgment would be around $10,000. The insured and his attorney thought we were completely wrong and that the judgment would not exceed $3500 in their rural area. Before the case went to trial we instructed our attorney to pay our $5000 into court to apply against any judgment that might be rendered. The case was tried and resulted in a $12,000 verdict. This may have been the wrong way to handle the matter but it was our way of making sure that no claim of bad faith would be made on our part. You should always keep the insured and his attorney advised of settlement negotiations throughout the case.

Bad faith is one of those terms that is variable, that is, bad facts and careless handling can result in bad law and maybe bad faith. However, mere negligence in the handling of a case has not yet amounted to bad faith in Ohio. Good faith means being faithful in the performance of your duties under the insurance contract and in my opinion requires the exercise of the discretion that an ordinary prudent and reasonable person would exercise having had sufficient trial expe-

rience to exercise reasonable and prudent judgment in such cases and in some cases you had better lean over backwards in resolving doubts in favor of your opponent and against your company. There are a growing number of states which seem to be confusing the term negligence with bad faith and if we do not want Ohio to join the states which follow the negligence doctrine then it behooves us to convince our courts that we are exercising the reasonable and prudent judgment of good lawyers in the handling of these cases.

The insured gives up a valuable right when he transfers to you the exclusive right to conduct his case and decide the settlement thereof and having taken over this responsibility you must exercise the right in good faith. Your decision must be an honest and intelligent one. It was in fact said in a recent case "a good faith decision on the part of the insurance company (which includes you, if you are defending the company) upon the question of settlement must be preceded by the exercise of that degree of care and diligence which a man of ordinary care and prudence would exercise in the investigation and adjustment of claims." *Hilker v. Insurance Company,* 204 Wisc. 1.

A company may be guilty of bad faith in its refusal to settle if it is guilty of negligence in investigation as to liability and damages or in the defense of the case according to the states following the negligence doctrine. The decision not to settle in order to be in good faith must be preceded by thorough investigation as to liability and damage. *Bolling v. Co.,* 173 Okla. 160. Generally speaking the question of the insurer's negligence is for the jury to determine and you know that that means judgment for the plaintiff in 99 44/100% of the cases, as Ivory soap advertises. I merely make mention of these cases involving the negligence doctrine so that we can eliminate Ohio from the roll of states following the negligence doctrine by careful handling of the case in excess of policy limits.

Where there is real doubt of liability the insurer should not be held liable to the insured for the amount of judgment in excess of policy limits because of its refusal after judgment in the tort case to accept an offer to settle for an amount within the policy limits. *Farm Bureau v. Violano* referred to above. In this case we experienced the unusual. Counsel for plaintiff, after judgment in the personal injury case, offered to settle within the policy limit and we refused to pay it, until his Honor Judge Howe showed us how this could be accomplished. But the good Judge did save face for us by holding that plaintiff could not recover in excess of the policy limit.

A mistake of judgment is not bad faith and even in Wisconsin the mere fact that the defendant was unsuccessful either in the trial or in the Supreme Court does not show of itself that a defense was not made in good faith. *Wisconsin v. Insurance Co.,* 162 Wisc. 39. In *Burnham v. Insurance Co.,* 12 CCH 684, 10 Wash. (2d) 624, the facts were in dispute and the first trial resulted in a jury disagreement. As usual on second trial a large verdict for plaintiff was rendered. The court held that a mistake of judgment was not bad faith and that the authorities uniformly held that an insurance company is not liable beyond the limits of its policy for failure to compromise a claim against its insured when its determination is made in good faith. A judgment in favor of the plaintiff in the lower court was reversed by the Supreme Court. See also *Mendota Electric v. Co.,* 175 Minn. 181, 221 N. W. 61. Likewise an insurer does not act in bad faith if it refuses to settle in the honest belief that it has a favorable chance of victory or keep the verdict within the policy limit or upon reasonable grounds believes the compromise settlement is excessive or that it has a good legal defense as yet undetermined by a court of last resort and which fairly seemed applicable to the case. *City of Wakefield v. Co.,* 246 Mich. 645; *Stowers v. Co.,* 295 S. W. 257, (Texas).

A Kentucky court really got down to fundamentals in its denial of recovery against the insurance company in the case of *Georgia v. Mann,* 242 Ky. 447, when it said that the gift of prophecy is not in ordinary mortals and as yet their vision has not reached such a state of perfection that they have the power to predict what will be the verdict of a jury on disputed facts. But on the opposite side of the fence see the case of *Nosey v. American Auto* from the good state of Tennessee, 68 Fed. (2d) 808, where American Auto's insured was sued for $40,000 and the company refused to settle for its policy limits of $10,000, with a verdict of $22,500. The court held that the rejection of the offer because of the circumstances in that case (misrepresentation of coverage) was not in good faith and permitted the insured to recover

from the company. And an illustration of which way the wind is beginning to blow in Ohio, see *New Amsterdam Casualty Company v. East Tenn. Telephone Company,* 66 O. App. 308, 34 N. E. (2d) 68, where the court made this observation, "It (co.) was bound to take care that no unnecessary liability was cast upon the assured by a negligent defense."

For every offense there should be a defense and in these excess policy limit cases where you are warranted in refusing to settle within policy limits but the insured insists that you do so, I would suggest that you write the insured and his attorney a letter stating your reasons why the settlement should not be made and suggest to them that if the insured is worried about the possibility of a judgment in excess of policy limits being secured in the case that the insured proceed to make such settlement as he deems advisable with respect to his liability for any excess judgment over the policy limits. In other words let him paddle his own canoe and you paddle yours and everybody ought to be happy.

I believe any experienced lawyer or court will agree that you or I cannot tell within any degree of certainty as to what a particular jury will do in a particular case. For example, we have all had the experience of a case being tried and being reversed in the upper courts and upon retrial an opposite verdict being reached by a different jury but this does not excuse the exercise of the experienced judgment mentioned above. You who are representing insurance companies as local counsel are becoming more and more part and parcel of this responsibility of exercising good faith. It is your duty to investigate the case carefully in spite of the investigation made by the company adjuster, to contact the witnesses and talk with them so as to size them up with respect to the oncoming trial, to make sure that complete medical information is available, to give your impression of the insured as a witness and his financial responsibility. You should then make sure that you give a considered recommendation to the company as to what you think as to the value of the case for purposes of settlement, the outcome, if submitted to trial, and your final recommendation as to what should be done.

In the first place the company adjuster may have been young and inexperienced. In the second place the personal injury manager back at the home office having charge of your territory may never have had a day's experience in the actual trial of a lawsuit and may not fully appreciate the situation as well as he should. After you have done these things then your liability has been discharged as far as seeing that the company is fully informed and if it still does not want to make the settlement you suggest, then that is the company's privilege and it may also be its privilege to defend a direct suit for the exercise of good faith if it has not in fact exercised the reasonable and prudent judgment of a man experienced in such matters.

In conclusion I would recommend in these excess policy limit cases—

1. That you make a complete and thorough investigation of the case as to liability, injuries and damages.

2. That you make sure the insured is kept informed of all matters pertaining to the case throughout its handling and extend to him the opportunity to be represented by his own attorney.

3. Keep the insured advised of all of the settlement negotiations and if it is your considered opinion that a settlement within policy limits should not be made advise the insured and suggest that he proceed to settle his liability in excess of policy limits if he insists upon a settlement within policy limits.

4. Never take arbitrary or stubborn attitudes but conduct negotiations on a sound, reasonable basis and in good faith. Do not make offers which are obviously unfair or inadequate but tell opposing counsel that his ideas of settlement are so far out of line with what your ideas are that you would prefer not to make an offer that would seem ridiculous to him but that you will be glad to submit the matter to the company and that you will be glad to discuss the matter of settlement with him at any time.

5. Prepare your case for trial to the Nth degree so to speak, and try it as well as you are capable of doing.

In conclusion let me urge you to do everything within your power to protect the goose that lays the golden egg so that you and I may long continue to benefit under its protecting wings.

Index of Cases

That non-waiver agreements or letters of reservation of rights are valid see:

Myers v. Ocean Accident and Guarantee Corp. Ltd., 99 F. (2d) 485 (Ohio).

Liddell v. Standard Accident Insurance Company, 187 N. E. (Mass.) 39.
Laroche v. Farm Bureau Mutual Automobile Insurance Company, 335 Pa. 478, 7 ATL (2d) 361.
Associated Indemnity Corp. v. Wachsmith—6 Auto Cases—1036 (Wash.)
Hartford Accident and Indemnity Co. v. Randall, 125 O. S. 581, 183 N. E. 433.

As to waiver see particularly:
Fidelity and Casualty Co. v. Blausey, 49 O. App. 556, 197 N. E. 385.
Venditti v. Mucciaroni, 8 N. E. (2d) 460.

For cases involving other insurance or where two policies cover the same accident see:
Maryland Casualty Co. v. Bankers Ind. Co., 51 O. App. 323, 200 N. E. 849.
Commercial Casualty Ins. Co. v. Knutsen Motor Trucking Co., 36 O. App. 241, 173 N. E. 241.
Travelers Ind. Co. v. State Auto Ins. Co., 37 N. E. (2d) 198.

Consolidated Shippers, Inc. v. Pacific Emp. Ins. Co., 112 P. (2d) 673.
Zurich Gen. Acc. & Liability Ins. Co. v. Clamor, 36 F. Sup. 954, affd. 124 F. (2d) 717 (CCA 7th Ill.)
Thompson Heating Corp. v. Hardware Indemnity Ins. Co.
Maryland Casualty Co. v. Gaugh et al, 72 O. App. 260.
Massachusetts Bonding & Ins. Co. v. The Dingle Clark Co. et al, 142 O. S. 346.
The Globe Indemnity Co. v. Schmidt, 142 O. S. 595.
Maryland Casualty Co. v. Frederick Co., 142 O. S. 605.

Where one insurer covers both cars:
O'Morrow v. Borad, 23 Automobile Cases 656.

For paper on "Conduct and Liability of an Insurer When the Claim and Judgment exceed the Coverage," by F. B. Baylor of Lincoln, Nebraska, see Insurance Counsel Journal for April, 1944 at page 7.

Right of Action for the Wrongful Death of an Unborn Child

J. H. GONGWER
Mansfield, Ohio

IN THE April, 1950, issue of the Journal, I discussed the case of *Williams, an infant, v. The Marion Rapid Transit, Inc.*, 152 O. S. 114, in which the Supreme Court of Ohio held that an action for damages could be maintained by an infant for injuries received prior to birth, resulting from the negligence of another.

In that discussion I attempted to point out some of the problems implicit in that decision and that might be expected to follow. One of these was a wrongful death action, either (1) as the result of having been born dead, or (2) of having died subsequent to birth, in either case due to the negligence of another.

The second of these situations has now been decided by the Supreme Court of Ohio, in the case of *Jasinsky, Admr. v. Potts*, 153 O. S. 529. The petition alleged that on August 23, 1945, the defendant negligently injured the mother of the decedent by causing his automobile to collide with the automobile in which the mother was riding; that the mother was in her eighth month of pregnancy; that the impact and blows to the abdomen were transmitted directly to plaintiff's decedent; that the mother went into immediate labor and gave birth to the decedent on August 26, 1945, one month before the normal date of delivery; that as a result of such injury and premature birth, the mother's labor was four times as severe and lasted twenty-four hours longer than "normal labor;" that plaintiff's decedent died on November 20, 1945, from a cerebral injury "brought about by his premature and difficult delivery from his mother's body, unprepared for such delivery and by direct blows received by him at the time of the mother's injury."

The Trial Court sustained a demurrer to plaintiff's petition and when plaintiff elected not to plead further, judgment was rendered for the defendant. The Court of Appeals reversed the judgment of the Trial Court and remanded the cause to the Common Pleas Court. The motion to certify the record for review was sustained by the Supreme Court, which Court, after a hearing on the merits, affirmed the judg-

ment of the Court of Appeals. The Court's decision was predicated largely upon its decision in the case of *Williams v. The Marion Rapid Transit, Inc.*

In the case under discussion the Court said that the rationale of the Williams' decision is that an unborn viable child is a person, and affirmed the decision of the Court of Appeals that since an unborn viable child is a person, its injury by the negligent act of another before its birth, resulting in its death after birth, gives rise to a cause of action under the Wrongful Death Statute for the benefit of the next-of-kin. The Court stated that it recognized that the right of action is subject to all lawful defenses and that the damages must be limited to such pecuniary damage as will probably be suffered by the beneficiaries designated by statute.

Upon the basis of abstract legal principle, this decision may be justified. However, one isolated case does not establish a jurisprudence and the wisdom and rightness of a decision is determined, only when considered and weighed with other related decisions. One of the far reaching ramifications of this decision is illustrated by the decision of the Ohio Supreme Court in the case of *Immel, Admr. v. Richards,* 154 O. S. 52, decided one month after the Jasinsky case.

The Immel case was a wrongful death action resulting from the death of an infant, nine months of age. While I have not read the record, the Court's opinion and the dissenting opinion disclose that the evidence was that the child was normal and in good health; that the mother was twenty-two years of age; the father thirty years old, and with an income of $50.00 per week. The family was possessed of very little personal property.

At the trial the defendant did not take the stand and there was a verdict and judgment for plaintiff for $5,000.00, which was affirmed by the Court of Appeals. The Supreme Court reviewed the case after allowing a motion to certify and affirmed the judgment by a 4 to 3 decision.

The wrongful death statute of Ohio limits the recovery to the "pecuniary injury resulting from such death."

The Court discussed two elements of damage: (1) The right of the parent to receive the child's earnings; and (2) The statutory duty upon an adult child to support a destitute parent. The Court ignored the fact that the child is required to attend school until he reaches the age of eighteen years, so that there could be only three years of earnings at the most. Using a quotation the Court said:

"It cannot be said, as a matter of law, that the expense of maintaining and educating the child would necessarily exceed any pecuniary advantage which the parents could have derived from his services had he lived."

This question seems obvious—Why must the law ignore the realities of life? It is common and universal knowledge that if a child is educated through college, he remains a financial liability until after he reaches his majority; if he quits school before that, and goes to work, it is a rare case indeed, where any of the earnings find their way into the family coffer.

The Court cites an earlier Ohio case, *Karr, Admr. v. Sixt,* 146 O. S. 527, in which the Court said that a presumption of pecuniary injury ordinarily exists in favor of those persons legally entitled to services. Is it the law that the intervening years—in the case at bar, seventeen of them, which are years of financial outlay, shall be ignored, and the remotely possible three years of service, only, considered?

The import of the decision is that substantial recovery may be had in a wrongful death case without proof of "pecuniary injury."

In a vigorous dissenting opinion, Judge Taft calls attention to certain previous decisions of the Ohio Supreme Court, particularly the cases of *Pennsylvania Company v. Files,* 65 O. S. 403, and *Hamden Lodge v. Ohio Fuel Gas Company,* 127 O. S. 469. These cases hold that recovery shall be limited to the pecuniary injury that is "reasonably certain" to result. He emphasizes that the burden of proof is upon the plaintiff and protests against the judgment of $5,000.00, wholly without proof, resting solely upon the rule that "a presumption of pecuniary injury ordinarily exists. . . . "

This decision does violence to the facts and actualities of life, or as Judge Taft puts it, "It is necessary to shut one's eyes to the realities of life." We have condemned many of the ancient so-called "legal fictions," the product or result of cerebral legerdemain indulged in to arrive at the desired end. This gave rise to what the fiction writers called "legal hocus pocus." Certainly there are cases where support and services may reasonably be expected from an infant. In such cases, there should be an adequate recovery.

But to throw a presumption at a jury and to permit it to speculate, without any guide or limit is certainly far afield from our time-honored concept which requires proof from him who seeks to recover damages.

Conceivably, had the decedent in this case been injured before birth, the Court would have approved a similar verdict. My quarrel with the decision is that if the law permits recovery for pecuniary injury only, then a verdict should only be permitted to stand when it is responsive to proof of such damage.

If a wrongful death recovery may be predicated upon such elements as bereavement or mental pain and suffering of the beneficiaries or the loss of the society or comfort of the deceased, then let us approach it by legislation and not judicial distortion.

I have not had an opportunity to examine the cases in other jurisdictions, and, hence, do not know if the Ohio cases indicate a general trend or merely indicate the departure of the Ohio Court from what had always been regarded as the law —that the plaintiff must prove his case.

A Critique On The Wage-Hour Division's Regulations For Belo Type Contracts

D. P. Cavanaugh
Hartford, Connecticut

THE "Belo" type contract adopted by many insurance companies in 1942 as a means of extending Wage-Hour Law coverage to their outside employees, such as claim adjusters, pay roll auditors, inspectors, etc,, became less important and gradually fell into disuse as starting salary scales increased and fewer employees of this type remained below the $2400 salary bracket required for administrative employee exemption.

However, in 1949 the increase from $2400 to $3900 in the statutory salary requirement for exemption again revived interest in the "Belo" type contract as a possible solution to the outside employee Wage-Hour problems.

Section 7 (e) of the Law, enacted over the objection of the Wage-Hour Division as part of the 1949 amendments, seemed specially designed to recognize and offer a practical solution to these problems, not only in the insurance business, but in other businesses having employees who necessarily work irregular hours—especially employees who travel and are frequently involved in border-line distinctions between "working time" and "personal time."

Those who hailed 7 (e) as the final answer to the Wage-Hour Division's objections to the Belo type contract were to discover when the Interpretative Bulletin on Overtime Compensation (Section 778.18, January 1950) was released, that the Division seems determined to carry on its campaign against these contracts. Under the mask of interpretation, the Division levels against Section 7 (e) of the Law practically the same arguments that were used against the Supreme Court's decision in the Belo case. Their attempts to upset the Belo decision were defeated in the Halliburton case and, as will be outlined briefly herein, there is reason to expect that their attempts to upset 7 (e) will meet a similar fate.

The Belo type contract provides, with figures inserted as an example, that:

> "The employee's basic or regular rate of pay will be $1.00 per hour for the first forty hours each work week, and not less than one and one-half times said rate for time over forty hours worked each work week; with a guarantee by the company that he shall receive for regular time and for such overtime as the necessities of the business may demand in any work week a sum not less than $52.00."

Does such a contract, if entered into with an employee whose duties necessitate irregular hours always totaling less than forty-eight hours a week, meet the requirements of Section 7 (e) of the Act?

According to 778.18, the contract, under such circumstances, would not qualify under 7 (e) because the weekly guarantee would never be exceeded and the specified hourly rate would never be operative in

determining the amount of the employee's pay. The issue is whether these requirements of the Division are warranted by the language of the Act and its legislative history.

The pertinent provisions of the Act read as follows:

> "Sec. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."
>
> "Sec. 7. (e) No employer shall be deemed to have violated sub-section (a) by employing any employee for a work week in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified."

The fundamental error in the Administrator's interpretation of 7 (e) is his assumption that the words "regular rate" in 7 (e) are to be given the same meaning that the courts have given to these words in interpreting 7 (a). He slides over the fact that 7 (e) is an exception to 7 (a) and gives the parties a right by contract to "specify" a regular rate. This differentiates a 7 (e) regular rate from a 7 (a) regular rate, for the latter must, for each work week, be not a rate specified in a contract but the actual "regular rate at which he is employed" during the week.

The "specified" regular rate is 7 (e) cannot mean the actual rate to be applicable in a particular work week in determining the total pay of the employee for the week, because in any week in which the weekly guarantee is operative the guarantee rather than the "specified" rate will determine the actual pay. Yet, the Act permits both a "specified" regular rate and a weekly guarantee and must contemplate that the two can operate concurrently at all times without the one destroying the other.

The Administrator recognizes this obstacle, but he attempts to by-pass it by holding that if the specified rate is actually operative in a "significant number of workweeks," it will be considered as the regular rate even in those weeks in which it is not actually operative.

This strange new species of "regular rate" which the Administrator produces by grafting the 7 (a) regular rate onto the 7 (e) specified regular rate cannot, he admits, be fixed in advance, except by guesswork, and must be reviewed every six months or so to determine if the original guess was a lucky one.

Furthermore, the "significant number of workweeks" test, aside from its ambiguity, involves a repudiation of the Administrator's own regulations on computation of wages and hours which provide that the Act takes a single work week as its standard and does not permit averaging hours over two or more weeks, and that an employee's "regular rate" in any work week is an hourly rate for the week determined by dividing his remuneration for that week (except statutory exclusions) by the total number of hours worked in the week. 778. 2 (d), 778. 3 (b).

The single work week standard can be preserved, guesswork eliminated, and the contract authorized by 7 (e) can be preserved as a practical instrument by recognizing that the permitted weekly guarantee should not be construed as affecting the employee's "specified" regular rate of pay. Rather, it should be excluded in determining "regular rate" just as certain other items specified in Section 7 of the Act are excluded. The propriety of this interpretation is indicated by the fact that the 7 (e) contract does not specify, for a week in which the guarantee is operative, how much of the guarantee in excess of pay at the specified rate is to be credited to regular rate and how much to overtime pay; and thus, the Administrator's attempt to allocate this excess either to a regular rate, or to overtime pay, or partly to each, arbitrarily reads into the contract something not provided therein or required by the Act.

One of the main objections of the Administrator to the Belo type of contract has been that its use would enable an employer to set so high a guarantee that no employee would ever exceed it, with the result that the penalty of overtime would never be incurred by the employer. Section 7 (e) sets a limit of sixty hours on the guarantee, and requires that the guarantee be based on the rates of not less than seventy-five cents per hour specified in the contract. This, together with the other limitations in 7 (e), prevents the wholesale evasions of the overtime principle; and the Administrator's requirement that the guarantee must be exceeded in a "significant" number of weeks is, in view of these facts, an unnecessary one.

The legislative history of Section 7 (e) also demonstrates the incorrectness of the Wage-Hour Division's interpretation. Section 7 (e) of the present Act originated as part of an amendment to H. R. 5856. As introduced by Rep. Lesinski, H. R. 5856, Section 7 (c), contained the following requirements for a valid "Belo" contract:

> "(1) a bona fide hourly rate of pay specified and actually used as the basis on which all compensation for such employment is computed;
> "(2) a guarantee of compensation to the employee for each hour in excess of forty worked by him in any workweek, in an amount not less than one and one-half times such bona fide hourly rate; and
> "(3) a specified minimum number of hours (not less than forty and not more than sixty, and bearing a reasonable relationship to the range of weekly hours customarily worked in such occupation during a representative period of time) for which such employee is guaranteed employment or pay in each workweek at the rates specified in the contract."

The passage of 7 (e) after rejection of 7 (c) of the original bill thus constitutes direct Congressional repudiation of the requirements the Wage-Hour Division now seeks to impose.

However unwarranted the interpretations of the Administrator may be, few employers may be willing to run the risk of ignoring these regulations because of the weight which the courts have at times attached to administrative regulations.

Those employers who are willing to run the calculated risk may take some comfort from the fact that the Administrator, under Section 17 of the Law, merely has the power to restrain violations of the law and is expressly prohibited from ordering payment to employees of unpaid minimum wages or overtime compensation. Even under Section 16 of the Law, the Administrator is authorized to bring an action in behalf of an employee to recover minimum wages or overtime compensation only when requested to do so by the employee in writing, and then only if the issues of law involved in the action have been settled finally by the courts.

Geography And The Expert Witness In A Malpractice Case

PHILIP C. STERRY
Los Angeles, California

IN A malpractice case the standard of care against which the acts of a physician or surgeon are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in such an action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of the layman.

Courts have encountered some difficulties in stating the general rule by which to measure the qualifications of a physician to testify on the issue of due care; it has not been uniformly phrased either in language or substance because in earlier times, for reasons of practical necessity, it was based to a large extent upon geographical considerations which stemmed from the variations in facilities in various communities. Some courts required that the question of a physician's negligence be tested by the skill and care ordinarily possessed and used by doctors under similar conditions practicing in the *same* locality;[1] oth-

[1] Brown v. Hughes (1934)
94 Colo. 295; 30 P. 2d 259, 262.
Boyce v. Brown (1938)
51 Ariz. 416; 77 P. 455.
Adams v. Boyce (1940)
37 Cal. App. 2d 541; 99 P. 2d 1044.

ers have stated the test to be the skill and care exercised in the same or a *similar* locality;[2] while still others required that the cause of the defendant's negligence be tested by the skill and care of the average practitioner in the same *general neighborhood.*[3]

The theory supporting these various decisions, that the expert must be familiar with the degree of care used in the particular locality where the defendant practices " . . . is that a doctor in a small community or village, not having the same opportunity and resources for keeping abreast of the advances in his profession, should not be held to the same standard of care and skill as that employed by physicians and surgeons in large cities." (*Warnock v. Kraft,* 30 Cal. App. (2d) 1, 3 [85 Pac. (2d) 505, 506].)

However, because of the present day rapid method of transportation and easy means of communication, the trend of the decisions is to extend the duty of a doctor in the treatment of a patient and to minimize the former geographical qualifications of the expert, it being said that: "The duty of a doctor to his patient is measured by conditions as they exist, and not by what they have been in the past or may be in the future. Today, with the rapid method of transportation and easy means of communication, the horizons have been widened, and the duty of a doctor is not fulfilled merely by utilizing the means at hand in the particular village where he is practicing. So far as medical treatment is concerned, the borders of the locality and community have, in effect, been extended so far as to include those centers readily accessible where appropriate treatment may be had which the local physician, because of limited facilities or training, is unable to give." (*Tvedt v. Haugen,* 70 ND 338 [294 NW 183].)

A further reason for disregarding the former geographical qualifications is pointed out by the Supreme Court of Michigan in *Sampson v. Veenboer,* 252 Mich. 260 [234 NW 170, 172], the court remarking: "At times it may become necessary to secure the expert testimony of one who resides some distance from the home of a defendant accused of malpractice, for it may be difficult to obtain a witness to testify against one who bears the very high professional reputation of defendant. If it would always be necessary to secure an expert from the vicinity of the home of a defendant, who might be the only practitioner there, it would be impossible to secure such testimony at all."

In calling an expert witness from a locality other than the residence of the defendant or from out of the state presents, of course, the problem of whether such witness is qualified to testify as to the standard of care and skill in the locality in which the action arises and it would seem in any given jurisdiction that the decision of that question is dependent upon (1) the law of the jurisdiction regarding the standard by which the defendant's negligence is to be judged, whether by that of "same locality," "similar locality," or the "same general neighborhood," and (2) the knowledge of the witness as to the method of treatment and skill and care required in the particular or similar locality of the particular jurisdiction concerned.

As has been said, "Residence alone neither bars a physician from testifying nor qualifies him so to do." (*Meiselman v. Crown Heights Hosp., Inc.,* [285 N. Y. 389 (34 N. E. (2d) 767]), the matter of concern being the familiarity of the witness with the skill and care required in the particular locality in question.

A few of the many decisions stating the rule follow. In *Garaty v. Kaufman,* 115 Conn. 563 [162 Atl. 333], a witness who had had experience in reducing fractures in various cities within the state and in the same general neighborhood was held qualified. In *Interman v. Baker,* 214 Ind. 308 [15 N. E. (2d) 365], where it appeared the witness had practiced within the state and at one time in the locality in question and was familiar with the methods there used, was held to be qualified. On the other hand, in *Michael v. Roberts,* 91 N. H. 499 [23 Atl. (2d) 361], a witness who was practicing in Boston, Massachusetts, was held unqualified to testify as to the care and skill in the defendant's community which was a smaller and dissimilar one. The same conclusion was reached in *Dye v. Corbin,* 49 W. Va. 266 [53 S. E. 147].

[2]McNamara v. Emmons (1939)
36 Cal. App. 2d 199; 97 P. 2d 503.
Specht v. Gaines (1941)
65 Ga. App. 782; 16 S. E. 2d 507.
Whetstine v. Moravec (1940)
228 Iowa 352; 291 N. W. 425
Dietsch v. Mayberry (1942)
70 Ohio App. 527; 47 N. E. 2d 404.

[3]Hopkins v. Heller (1922)
59 Cal. App. 447; 210 P. 975.
Tanner v. Saunders (1933)
247 Ky. 90; 56 S. W. 2d 718.
Williams v. Marini (1932)
105 Va. 11; 162 Atl. 796.

The "same" or "similar" locality doctrine was applied in *Kirchner v. Dorsey,* 226 Iowa 283 [284 N. W. 171] and *Bartholomew v. Butts,* 232 Iowa 776 [5 N. W. 2, 7], the witnesses having been shown to have had considerable experience and familiarity with surrounding communities of the same type or in the same location in question.

A clear statement of the modern rule as to the geographical qualifications of a medical expert is to be found in *Sinz v. Owens,* decided by the Supreme Court of California in 1949 (33 Cal. (2d) 749 [205 Pac. (2d) 3, 5]). That was a case involving the treatment of fractures. The expert whose competency was questioned practiced in towns twenty-five to forty miles from a large city to which they and the town in which defendant practiced were tributary. The evidence established that the neighboring towns were similar to defendant's community and that the degree of care of that community was equal to that in the city to which the various towns were tributary, and that the same standard of care as to treatment of fractures of the kind involved prevailed throughout the state. The witness was there held to be competent to testify, the court saying:

"And competency of an expert 'is in every case a relative one, i.e. relative to the topic about which the person is asked to make his statement.' II Wigmore on Evidence, 3rd Ed., sec. 555, p. 634.

"The criterion in this regard is not the highest skill medical science knows; 'the law exacts of physicians and surgeons in the practice of their profession only that they possess and exercise that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of their profession under simliar circumstances.' 41 Am. Jur., Phys. & Surg., sec. 82, p. 201. The proof of that standard is made by the testimony of a physician qualified to speak as an expert and having in addition, what Wigmore has classified as 'occupational experience—the kind which is obtained casually and incidentally, yet steadily and adequately, in the course of some occupation or livelihood.' 2 Wigmore on Evidence, 3rd Ed., sec. 556, p. 635. He must have had basic educational and professional training as a general foundation for his testimony, but it is a practical knowledge of what is usually and customarily done by physicians under circumstances similar to those which confronted the defendant charged with malpractice that is of controlling importance in determining competency of the expert to testify to the degree of care against which the treatment given is to be measured."

* * *

"Emphasizing occupational experience as the dominant qualification, that is, the witness must have a familiarity with the existing practice under the circumstances and not merely that he practice medicine or live in the area, are the cases of *McGuire v. Baird,* 9 Cal. 2d 353, 70 P. 2d 915; *Taylor v. Fishbaugh,* 26 Cal. App. 2d 300, 79 P. 2d 174; and *Soady v. Washburn,* 114 Cal. App. 82, 299 P. 560. In the McGuire and Taylor cases there was no question as to the practice of the witness in the vicinity, but the court pointed to a lack of knowledge of the manner in which other doctors treated the condition presented to the defendant. In *Soady v. Washburn,* supra, the witness was a retired naval officer living in San Francisco. An objection to his testimony as to the standard of care was properly sustained, for it appeared that he had never engaged in civil practice in California or elsewhere.

"The more recent California cases upon the question of competency of a doctor in one community to testify as to the standard of care at another place, although phrasing the rule in terms of 'same' or 'similar' locality, have shown a clear tendency to depart from the earlier geographical limitations of the rule. Thus in *Sales v. Bacigalupi,* 47 Cal. App. 2d, p. 82, 117 P. 2d 399, 401, the ruling admitting the testimony of a doctor practicing in Oakland as to medical treatment in San Francisco was upheld with comment upon 'the close proximity of the two cities and the metropolitan character of the entire area.' And in *Pierce v. Paterson,* 50 Cal. App. 2d 486, 123 P. 2d 544, a general statement that the witness was familiar with the degree of care throughout Alameda County was held sufficient although apparently, there was no testimony of familiarity with conditions in the town where the treatment was given.

"The leading California case on this

point is *Lewis v. Johnson,* 12 Cal. 2d 558, 86 P. 2d 99, wherein the testimony of doctors practicing in Los Angeles was held admissible as to the standard of care in Long Beach. The court there stated the reason for the early rule requiring familiarity with the particular locality as 'in order that the standards of widely separated localities with different practices may be excluded. But to make the exclusion rest arbitrarily upon a geographical line . . . would be a misuse of the rules of evidence and in unjustifiable emphasis on empty technicalities.' "

Sinz v. Owens, 205 P. 2d 3, 5, 7, 8.

Right of Insurance Carrier Having Paid Auto Loss to Recover From Liquor Vendor Having Sold Liquor Causing Accident

PAUL E. PRICE
Chicago, Illinois

THE title to this article appeared in the July issue of the Insurance Counsel Journal for July, 1950, as a suggested subject for a future article. Inasmuch as the Appellate Court of Illinois in a case of first impression had occasion to consider in some detail the answer to the question posed by the caption, it is our privilege to bring to the attention of the insurance fraternity the conclusion at which the court arrived.

Economy Auto Insurance Company v. Brown, et al, 334 Ill. App. 579, 79 N. E. 2d 854, was an action by an insurance company against Joe Brown, doing business as Joe Brown's Tavern, and others, to recover under the Dram Shop Act of the State of Illinois sums of money paid by the plaintiff in settlement of liability claims against its insured who injured divers persons while driving his automobile in an intoxicated condition caused by the consumption of alcoholic beverages purchased from defendants.

The trial court sustained the defendants' motion to strike the complaint on the ground that it failed to state a cause of action, and dismissed the suit, from which judgment the plaintiff prosecuted an appeal to the Appellate Court of Illinois.

Section 14 of the Dram Shop Act (ch. 43, par. 155, Illinois Revised Statutes 1949) provides:

> "Every husband, wife, child, parent, guardian, employer or other person, who shall be injured, in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such person. . . ."

The sole issue presented for determination was the question of law whether the right of action conferred by the foregoing provision of the Dram Shop Act may be invoked by an insurance carrier on the theory that, in settling claims against its insured who committed certain wrongful acts while intoxicated, it sustained a property damage in consequence of intoxication under the terms of the statute. The court at the inception of its opinion stated that it was conceded that the rights asserted by the plaintiff are without precedent in this or any other jurisdiction and that, therefore, it became incumbent upon the court to determine from the terms and purport of the statute, and from the tenor and scope of the decisions interpreting it, whether the plaintiff's cause of action can legitimately come within the purview of the Dram Shop Act.

The court points out that the Illinois statute confers two separate and distinct causes of action against persons who may have caused the intoxication. The first right of action is granted to persons sustaining injuries to their person or property, or means of support, inflicted "by an intoxicated person," and the second applies to such injuries sustained "in consequence of intoxication."

The court concluded that in the case under consideration the plaintiff's rights,

if any, are asserted "in consequence of intoxication" since the insured inflicted direct injury only upon the persons injured and the car with which he collided and in no way directly damaged the plaintiff's property.

After arriving at the foregoing conclusion the court was confronted with the pivotal question whether the plaintiff's loss was "in consequence of intoxication." The words "in consequence of intoxication" have been judiciously construed as the equivalent of "proximately caused by."

The court decided that the plaintiff's loss was in consequence of its policy of liability insurance and its voluntary payment of claims thereunder to persons injured by its insured. Said the court:

> "This contract was entirely independent of, and in no way connected with the intoxication; it was entered into voluntarily by Thomas Roach" (the insured) "and the plaintiff some time prior to the collision, and plaintiff received premiums based upon the calculated risk as consideration for its contingent liability. . . . This contract of insurance was, therefore, not a natural and probable consequence of the intoxication, but rather an independent intervening factor, and the intoxication, at most, merely furnished a condition for the operation of the contract. . . . The intoxication of Roach may have caused injury to the persons in the car with which he collided, so that they may have properly asserted a cause of action under the Dram Shop Act, but it was not the proximate cause of plaintiff's payments under its policy, and any alleged property damage was, therefore, remote and indirect."

The court then likened the situation to that considered by the Supreme Court of Connecticut in the case of *Connecticut Mutual Life Insurance Company v. New York & N. H. R. Company, 25 Conn. 265, 65 Am. Dec. 571*, where the Connecticut court held that an action could not be maintained where the plaintiff life insurance company sued a railroad company for payments made under a policy insuring the life of Samuel Beach who was fatally injured as a result of defendant's negligence. Said the Illinois court:

> "In the instant case the alleged loss to the plaintiff insurance company was sustained only through its contractual relation with its insured, Roach. To complete the analogy to the aforementioned case, moreover, Roach's status is comparable to that of Beach, the insured, and defendants' positions may be deemed similar to that of the negligent tortfeasor, inasmuch as the Dram Shop Act imposes liability for the selling or giving of alcoholic liquor causing intoxication, rather than for negligence. Under the Connecticut decision, quoted with approval and cited as precedent by the courts of other jurisdictions, plaintiff's alleged property damage would be deemed remote and indirect."

In determining that the plaintiff could not recover under a theory of subrogation, the court points out that the theory of subrogation is predicated on the equitable doctrine that one who has indemnified another in pursuance of his obligation to do so, is entitled to the means of redress held by the party indemnified against the individual causing the loss. It is a right exercised by the insurer as successor to the remedies of the person indemnified, rather than its own right. However, since the plaintiff would under subrogation be entitled only to such remedies as the insured could properly assert and inasmuch as he was the intoxicated tortfeasor he acquired no rights either against the dram shop keepers or the persons with whom he collided.

While it has been held that the Act should be liberally construed to effectuate its broad objectives to encourage temperance in the consumption of alcoholic beverages by making those who furnish the means of intoxication liable for the damage resulting therefrom, yet the court specifically determined that:

> "It is not conceivable to this court, however, just how the 'mischief of intoxication is suppressed' and the broad purposes of the statute are promoted by permitting an insurance carrier, which has made payments under its liability policy, and thereby merely fulfilled its undertaking, to shift its business risks to the dram shop keepers. Obviously, such carriers were not the class of 'persons' for whose benefit the statute was enacted, and imposing liability upon the defendants, who allegedly caused the intoxication of the insured, in order to reimburse the carrier, is clearly not in furtherance of the objectives of the stat-

ute, nor in accordance with the terms thereof as interpreted by the courts."

Since the Illinois Dram Shop Act is at least as fulsome in the remedies which it affords to those injured in consequence of intoxication as other statutes in various jurisdictions affording redress to those injured in consequence of the sale of intoxicants, it would have been reasonable to conclude that views advanced by the Illinois Court would become persuasive authority to other courts when a similar question should become involved. The Illinois decision was rendered in 1948. However, the Michigan Supreme Court in January, 1950, in the case of *McDaniel v. Crapro*, 40 N. W. (2d) 724, 33 CCH Automobile Cases 263, by a process of somewhat devious reasoning indicates that under the somewhat similar circumstances there prevailing, the insurance carrier would not be without remedy.

In the Michigan case, a truck belonging to a partnership doing business as H & M Motor Sales was being driven by the son of one of the partners with his permission. During the course of the operation of the truck, the son purchased beer from the Lone Star Tavern and became intoxicated and while driving struck another automobile injuring the other driver and damaging both vehicles. Resulting judgments against the father, his son and the partnership were paid by the insurance carrier, and the partnership and its assignee, the insurance carrier brought an action against the tavern keeper and his surety. The partnership sought to recover a judgment for damage to its truck and the insurance company for the amount it paid in satisfying the judgment.

For all practical purposes, the Michigan statute and the Illinois statute relating to the sale of intoxicating liquors are substantially identical in the remedies afforded.

While paying lip service to the conclusion reached in the Illinois case, the Michigan Court nevertheless concluded that the partnership, as the owner of the truck, was a "person" under the statute, who had received an injury to its property and that any negligence attributable to the partnership under the Uniform Motor Vehicle Act, did not preclude its recovery against the tavern owner and its surety, and while under the rule announced by the Illinois Court, the insurance carrier did not have a right to an action in its own name, nevertheless, as assignee of the "insured person," i.e. the partnership, it had a right to stand in the shoes of the partnership to maintain the action.

It is submitted that to permit the bailor of a motor vehicle to take advantage of the intoxication of his bailee as was sanctioned by the Michigan Court in the case under consideration is a substantial repudiation of all the reasons of policy announced in the Illinois decision for denying an insurance carrier the right to take advantage of the intoxication of its assured to recoup its loss paid in conformity with the policy contract. As far as can be gleaned from the Michigan opinion, the judgments entered against the son, father and partnership were joint inseparable judgments. Hence, to permit the insurance carrier to pay the joint judgments thus obtained and then to recoup its loss arising out of the operation of its assured's vehicle by the intoxicated permissive user and at the same time affirm that the carrier could not maintain the action in its own right, is a mere play on words.

Liability of Guardian's Surety for Attorney's Fees and Costs Paid By Ward's Estate for Removing Guardian for Wrongful Act

RICHARD A. TURNER
Los Angeles, California

THIS subject was discussed at considerable length in a recent case decided by the District Court of Appeal of California in an opinion written by Presiding Justice Moore and concurred in by Justices McComb and Wilson. A rehearing was denied by the same Court and the Supreme Court of California refused to grant a hearing in that Court.

The case referred to is entitled *Hornaday v. Hornaday*, and is reported in 213 Pac. (2d) 91. The decision disposes of four actions which were consolidated for the purposes of the appeal. The facts are

somewhat complicated, but have been simplified and stated in the opinion with sufficient clarity that the legal problems involved may readily be understood.

This case will be of considerable interest to surety counsel because it is believed to be the leading case in the United States today on several of the points of law therein decided. Several of the leading cases from other states wherein a contra conclusion was reached, based on the statutes of those respective states, are distinguished.

It is thought that the importance of this opinion warrants the publication thereof in full. Accordingly it follows:

The question for decision is whether attorney's fees paid by the guardian of a minor's estate for services in effecting the removal of his predecessor in office may be recovered from the personal representative of such predecessor.

In September, 1942, F. Paul Hornaday was duly appointed guardian of the estates and persons of Patricia and Ronald Leach, minors. On November 11, 1944, he was removed as guardian of each estate by order of the court and was ordered to turn over to Mae McCallom as special guardian all the assets and records of each estate. Subsequently, the orders removing Mr. Hornaday were affirmed. *McCallom v. Hornaday,* 30 Cal. 2d 297, 182 P. 2d 529.

The events that precipitated the removal proceedings were his action in filing petitions for instructions for the sale of the assets of the estates. The petitions set forth his plan of procedure. Displeased with such plan and the evident desire of the guardian to acquire interests adverse to the faithful performance of his official duties, Mrs. McCallom caused herself to be appointed guardian ad litem of the minors, objected to Hornaday's petition and demanded his removal. The court issued an order for him to show cause why he should not be removed. He duly answered both the petition and the order. Following a hearing, the court made orders (1) denying his petition for instructions; (2) directing his removal and (3) appointing Mrs. McCallom as special guardian with powers of a general guardian in both proceedings. For a time she administered the two estates, then filed her final accounts whereby she requested allowances for her own services and for sums paid by her as fees, costs and expenses in causing Hornaday's removal. Omitting a recital of the numerous petitions, objections and hearings it all eventuated in the court's allowing her $34,008.51 out of Patricia's estate and $28,876 out of Ronald's estate for sums paid out for costs, and attorney's fees while she was acting under the court's appointment as guardian of the estates. Having been removed by order of court Hornaday filed his final account showing that he had turned over to his successor in office the assets of both estates. No costs were ever charged by him as guardian. The only charges made against him in either estate were assessed against him personally. Mrs. McCallom having deceased, her administrator filed her final account and petition in Ronald's estate for fees, costs and expenses incurred by the deceased guardian and it was settled and allowed. Patricia having been emancipated filed her own objections to the final accounts and after the court had settled them she thereafter pursued the same course as that of Ronald's guardian in an effort to retrieve the moneys paid out by Mrs. McCallom in her campaign to cause the removal of her predecessor. Each filed a petition in his own guardianship proceeding for an order surcharging the administratrix of the estate of Hornaday for the sums paid as expenses in causing the latter's removal. Patricia's amended petition in her guardianship proceedings alleged substantially the facts above related with reference to Hornaday's petition to sell the assets of her estate, the appointment of the guardian ad litem, the petition for Hornaday's removal, the findings that he had attempted to acquire interests adverse to his guardianship duties, that he was guilty of waste and mismanagement and had failed to file inventories and accounts as required by law; that such conduct resulted in "the necessary expenditure of funds from the estate of this minor and loss to said estate of certain costs and expenses" amounting to $53,403.38, the value of services of Mrs. McCallom and of her attorneys. The petition of Ronald's guardian was the same in form as that of Patricia. The amount he sought to have surcharged to Hornaday's estate was $39,376.

Mrs. Hornaday's demurrers to both petitions were sustained without leave to amend, her motion to quash the cita-

tions issued on the petitions were granted and the citations were dismissed. From such orders both petitioners gave notice of appeal but since no provision is made for appeal from such an order by section 1630 of the Probate Code which is exclusive in guardianship proceedings, *In re Guardianship of Lyle,* 77 Cal. App. 2d 159, 161, 174 P. 2d 910, those purported appeals will be dismissed.

Coeval with the filing of the petitions in the guardianship proceedings, the two wards instituted actions against the administratrix of Hornaday's estate and against National Surety Corporation, the surety on the guardianship bonds, for damages. After stating the facts above narrated the amended complaints allege that by the findings and order of the probate court it was adjudicated that Hornaday neglected faithfully to execute his duties as guardian and "conducted himself in a manner adverse to the faithful performance of his duties as such guardian;" that such neglect resulted directly and proximately in loss to the estates of said minors; that the attorneys employed by Mae McCallom rendered services to the minors and their estates in respect to the proceedings for the removal of Hornaday as guardian; that after his removal the court conducted hearings and found the value of the services of Mrs. McCallom and her attorneys and the costs, all of which were necessary to the preservation of the estates, and directed payment of such expenses which were paid and reported in the accounts of the duly acting guardians and those accounts were settled and allowed; that the National Surety Corporation as surety for Hornaday as guardian filed its bond with the clerk of the court on April 27, 1944, in the penal sum of $132,000 with the court's approval. Appellant alleged damages against the Hornaday estate and the National Surety Corporation in the amount paid as costs and attorney's fees in the removal proceedings.

After hearing of the demurrers of both defendants, the court sustained them and adjudged dismissals of both actions. For the purpose of this appeal the two orders in the guardianship proceedings and the two judgments were consolidated. Since the two complaints are in substance identical in theory and in fact this discussion will relate to Patricia's complaint and the conclusions derived will apply to Ronald's as well. This appeal is to test the correctness of the ruling on the demurrer.

Hornaday's Account Was Approved

The worst that was charged against the deposed guardian was that he planned to sell the estate of his ward to gain a personal advantage to himself. He took no goods, chattel or money of his ward. He merely laid a scheme whereby he planned to induce the court to authorize a sale for his advantage. Had it not been frustrated by vigilant eyes and diligent action it might have resulted in tragical loss to the estate. But between the moment of a criminal concept and the hour of its consummation there is always a *locus poenitentiae.* If the feeling of repentance intervenes the contemplated wrongful act dies abornin' and no detriment is suffered.

Hornaday not having taken a farthing from his ward and his final account having been approved by the court, his status with respect to the guardianship was settled and by the established rule the order became *res judicata. Adams v. Martin,* 3 Cal. 2d 246, 248, 44 P. 2d 572. As in the cited case, this is not an action in equity to set aside the order settling Hornaday's account on the ground of extrinsic fraud, nor does appellant contend that her property was concealed or that Hornaday failed to account for it. Neither did she allege a fraudulent prevention of a hearing.

No Decree Declaring a Breach or Amount Due by Hornaday

,The only things determined by the findings and judgment on the charges brought by Mrs. McCallom were Hornaday's perfidy and his removal from office and that Mrs. McCallom recover her costs from Hornaday, the removed guardian, or from the estate of the ward. The amended complaint alleges that by the findings, conclusions and order of Judge Vickers it was adjudicated that Hornaday had neglected to execute faithfully the duties of his trust as such guardian and had conducted himself in a manner adverse to the faithful performance of his official duties. If the findings and conclusions do not have the force and effect of an adjudication, *In re Guardianship of Leach,* 30 Cal. 2d 297, 310, 182 P. 2d 529, and if the order

of the court merely removed Hornaday as guardian there is no decree establishing the fact of the breach or the amount due by him. Without such decree the surety on the guardian's bond cannot be held for the loss. *Richardson v. Royal Indemnity Company*, 21 Cal. 2d 557, 560, 134 P. 2d 1. It is true that the amended complaint sets forth as a recital that after Hornaday filed his petition for leave to sell "the stock" Mrs. McCallom employed attorneys "on behalf of the estate . . . to assist her in the prosecution of the rights of said minor and her estate . . . that subsequent to hearings conducted in this court, orders . . . were made . . . finding the value of said services" of Mrs. McCallom as guardian "and of the services of said attorneys, and the costs of said proceedings." However, no proceeding was ever instituted to establish the cost of the removal of Hornaday. *In re Guardianship of Leach*, supra. No amount is alleged to have been fixed as such cost. The complaint merely declares that such services and costs were necessary to the preservation of the minor's estate, then alleges an order was made directing payment of the amount from the minor's estate, and that such amount was paid "on account of said expenses." The "expenses" so paid were incurred during a three-year period but there is no allegation that they were incurred "during the pendency" of the removal proceedings; nor is it alleged that such services were applied soley to the effort of removing the disloyal guardian. In fact, he was removed eight months and 14 days after Mrs. McCallom was appointed as guardian ad litem. In the absence of allegations of Hornaday's breach and of the amount found to be due by reason thereof no cause of action is stated.

No Claim Was Filed

Appellant's cause of action is barred by virtue of her failure to file her claim in the estate of Hornaday as required by section 732 of the Probate Code. That statute is mandatory: "A judgment against the decedent for the recovery of money must be filed or presented in the same manner as other claims." Appellant contends that her claim is based upon a tort, not upon contract. Probate Code, sec. 707. If she relies upon Hornaday's bond or upon his oath of office, surely her claim is based upon contract. There is no statute or decision cited or known which excuses the timely filing of a claim against a decedent's estate or extends the time by reason of the fact that the claimant was a minor, had no guardian during a portion of the time during which he could have filed a claim, or because he had no guardian at all. No person can avail himself of a disability unless it existed when his right of action accrued, Code Civ. Proc., sec. 357, and no claim which is barred shall be allowed by the administrator or by the judge. Probate Code, sec. 708. The only judgment entered by the Probate Court against Hornaday was for costs in appellant's guardianship proceeding in the sum of $226.85. Since that sum was paid by her guardianship estate her right to claim payment now against Hornaday must necessarily be based upon that judgment and her subrogation thereto. The pleading shows no such claim was filed. [The same is true in Ronald's estate.]

Moreover, at the time and in the proceeding wherein the allowance of attorney's fees was made, Hornaday was not a party. He had already been removed from office for two months. Is it reasonable that he should be charged with sums paid by Mrs. McCallom without his approval and fixed by the court without his even being notified of the hearing or called to testify to the value of the services rendered? To suggest that his estate should now be required to pay the judgments rendered ex-parte against him is to ignore the doctrine of due process. Certainly his own administratrix would be entitled to have the privilege of contesting such claim after the orthodox fashion which could have been done only after a filing of the claim. But had such claim been filed, it would have been rejected because the judgment for Mrs. McCallom's services and those of her attorneys was not against Hornaday. If he had appropriated $100,000 out of appellant's estate and judgment therefor had been entered against him for the money, there would have been no chance to recover the amount of the judgment from his estate without presentment by the owner of the judgment of a claim based on such judgment. Since that is true, it is inconceivable that appellant could walk unceremoniously into court and demand judgment for a sum of money awarded

against an estate in a proceeding in which the alleged debtor was not a participant.

Appellant's contention that her action is based upon a tort is refuted by the fact that she has sued upon the bond and seeks to collect from the surety. Of course, before she can obtain judgment against the surety there must have been established a breach of the bond and the amount of damages suffered by the estate. Since no judgment was ever entered against Hornaday in the estate proceedings and no claim was filed with his administratrix within time, Probate Code, sec. 700 and was therefore barred, recovery for breach of contract is hopeless.

As to the claim's being based upon tort: what act of Hornaday is alleged as a tort? Paragraph III of the amended complaint is the nearest approach. It is there alleged that as guardian of the estate on March 28, 1944, Hornaday filed a petition to sell an asset of the minor's estate consisting of stock in the Leach Relay Corporation; the petition was noticed for hearing; objections were filed; Hornaday was removed. His motion to the court, asking the court to join him in selling the stock was no tort. Had the court granted the motion and had Hornaday sold the stock to his own dummy and thereby realized a profit, a tort would have occurred. But a mere gesture, however vicious, is not an actionable tort; is not a basis for recovery. See *Wallace v. Kerr,* 42 Cal. App. 2d 182, 185, 108 P. 2d 754, and authorities there cited holding that it is the civil wrong resulting in damage that constitutes the actionable tort, not the naked conspiracy itself.

The estate of a minor is in the custody of the Probate Court. *In re Guardianship of Russell,* 21 Cal. 2d 767, 772, 135 P. 2d 369. The guardian when he pursues the administration of an estate according to law is an agent of the court, not its master. In filing his petition, Hornaday was either asking the advice and approval of his plan to sell the stock or his mind was filled with dark pictures of his taking over the stock at a huge profit to himself. If the court had found that he was innocently recommending a sale of which the court disapproved, his petition would have been dismissed, the estate paying any cost incurred by the court's investigation. Had it found the second alternative, it would have dismissed the petition, the estate paying the cost. Removal of the guardian would rest in the court's discretion. If by filing a petition with evil intent no damage is proximately caused thereby, what sum would the beneficiary of the estate be entitled to collect from the guardian? Certainly, none. *City of San Bruno v. National Surety Co.,* 119 Cal. App. 27, 31, 5 P. 2d 951. And unless the Probate Court surcharged the guardian's account with a definite sum allowed, after a hearing to which the guardian was a party it could not be collected from the guardian's estate, nor from the surety on his bond.

Attorney's Fees Are Not Chargeable to the Defendant

It is a settled rule of California that attorney's fees paid by a successful plaintiff in an action are never recoverable against the defendant. The only known exceptions to the rule are found in those cases (1) where the defendant has promised to pay such fees in event of plaintiff's recovery or (2) there is a statute authorizing such charges as an element of damage suffered. An agreement on a promissory note or in a lease to pay attorney's fees if payee should prevail in an action based on the writing are illustrative of the first class. Statutes authorizing charges such as expenses incurred in the dissolution of attachments or injunctions where a statutory remedy has been abused illustrate the second class. *Soule v. United States Fidelity & Guaranty Co.,* 82 Cal. App. 572, 573, 255 P. 886; *Elder v. Kutner,* 97 Cal. 490, 493, 32 P. 563. Even in assessing damages suffered by a defendant whose property has been unjustly attached the court is zealous to avoid awarding more than is necessarily incurred to dissolve a writ of attachment, *Elder v. Kutner,* supra, 97 Cal. at page 494, 32 P. 563, or an injunction. *San Diego Water Company v. Pacific Coast Steamship Co.,* 101 Cal. 216, 221, 35 P. 651; *Bustamente v. Stewart,* 55 Cal. 115, 116. But awarding attorney's fees for the *defense of the action* wherein an extraordinary writ has been issued is not authorized. *Elder v. Kutner,* supra.

The policy of the law of this state that an unsuccessful party to a legal controversy cannot be assessed damages to the extent of the value of the attorney's

service employed by his adversary is established by a long line of decisions. *Spooner v. Cady,* 5 Cal. Unrep. 357, 44 P. 1018; *Mitchell v. Hawley,* 79 Cal. 301, 302, 21 P. 833; *San Diego Water Co. v. Pacific Coast Steamship Co.,* supra, 101 Cal. at page 220, 35 P. 651; *Miller v. Kehoe,* 107 Cal. 340, 343, 40 P. 485; *Curtiss v. Bachman,* 110 Cal. 433, 437, 42 P. 910, 52 Am. St. Rep. 111; *Black v. Hilliker,* 130 Cal. 190, 193, 62 P. 481; *Commercial Savings Bank v. Hornberger,* 140 Cal. 16, 22, 73 P. 625; *Los Angeles Trust & Savings Bank v. Ward,* 197 Cal. 103, 107, 239 P. 847; *Kahn v. Smith,* 23 Cal. 2d 12, 15, 142 P. 2d 13; *In re Estate of Reade,* 31 Cal. 2d 669, 671, 191 P. 2d 745; 11A Cal. Jur., p. 247, sec. 161. These and other authorities disclose a uniform policy of the courts that the unsuccessful litigant shall not in the ordinary contest be required to pay counsel fees incurred by his opponent. The practice of awarding costs and attorney fees for services rendered by a plaintiff who in equity protects, preserves or increases a fund in which many are interested does not alter or depreciate the general rule. The California rule prevails generally in other jurisdictions. *Dorris v. Miller,* 105 Iowa 564, 75 N. W. 482; *Huff v. Bidwell,* 5 Cir., 195 F. 430, 432; *Tullock v. Mulvane,* 184 U. S. 497, 22 S. Ct. 372, 46 L. Ed. 657, 666; *In re Estate of Bell,* 145 Cal. 646, 651, 79 P. 358. While under section 3336 of the Civil Code in actions for conversion the plaintiff may recover compensation for the time and money properly expended in pursuit of the property, yet attorneys' fees will not be allowed under the guise of punitive damages. *Viner v. Utrecht,* 26 Cal. 2d 261, 273, 158 P. 2d 3.

Appellant's Authorities

Appellant relies for recovery upon decisions of other jurisdictions. *Phillips v. Liebmann,* 10 App. Div. 128, 41 N. Y. S. 1020; *Ordinary of State v. Connolly,* 75 N. J. Eq. 521, 72 A. 363, 138 Am. St. Rep. 577; *Mississippi Valley Trust Co. v. Taylor,* Mo. App., 238 S. W. 558; *Chase v. Faulkner,* 307 Mass. 404, 30 N. E. 2d 239; *Wiley v. Fuller,* 310 Mass. 597, 39 N. E. 2d 418. Wherever any of such cases appears to lend support to appellant it is because of the phraseology or diction of the statute construed. This is exemplified in the New Jersey statute which authorizes the chancellor *to allow such counsel* fees to the successful party as he shall deem reasonable. N. J. S. A. 2:29-131. The Massachusetts statute authorizes the Supreme Judicial Court on appeal to award "expenses" out of the estate in controversy. G. L. (Ter. Ed.) c. 215, § 45. In commenting upon the McIntire and Ordinary cases the author of the note in 34 C. J. S., Executors and Administrators, § 986, page 1230, observes that "attorney's fees expended in recovering moneys improperly paid by an administrator have been held not a proper item of damages."

While the Massachusetts statute authorizes the court of last resort to award "expenses . . . to either party, to be paid by the other . . . out of the estate . . . as justice and equity may require" Chapter 215, sec. 45, General Laws, the California statute authorizes the court to "order costs to be paid by any party to the proceedings, or out of the assets of the estate." Probate Code, sec. 1232. Such language could not be reasonably interpreted to mean anything other than that the court is at liberty to exercise its discretion, decide against whom *costs* of a proceeding shall be taxed. Compensation to attorneys is left to the agreement of the parties. Code Civ. Proc., sec. 1021. Had the legislature intended that the fees of counsel employed in a contest to oust a designing administrator should be recoverable from him as a part of the costs it would have so declared. *In re Estate of Olmstead,* 120 Cal. 447, 454, 52 P. 804.

Appellant cites certain California decisions as persuasive of their thesis, to wit, *McCormick v. Marcy,* 165 Cal. 386, 132 P. 449; *Nelson v. Kellogg,* 162 Cal. 621, 123 P. 1115, Ann. Cas. 1913D, 759; *Levitzky v. Canning,* 33 Cal. 299; *Neeves v. Costa,* 5 Cal. App. 111, 89 P. 860; *Stevens v. Chisholm,* 179 Cal. 557, 178 P. 128; *Peebler v. Olds,* 71 Cal. App. 2d 382, 162 P. 2d 953; *Bird v. American Surety Company,* 175 Cal. 6245, 166 P. 1009; *Handy v. Samaha,* 117 Cal. App. 286, 3 P. 2d 602. Each of these cases is distinguished on its facts or it says nothing appertaining to the issue under consideration. In *McCormick v. Marcy* there was a warranty to defend the title to land. That contract justified an award of damages to the extent of the reasonable expense incurred by the vendee. *Nelson v. Kellogg* did not involve attorney's fees incurred in the *defense of an*

action but merely the attorney's fees paid to procure her release from the arrest. The same was true of *Neeves v. Costa. Stevens v. Chisholm* was an action for malicious prosecution. Under section 3294, Civil Code, the court was warranted in assessing the reasonable attorney's fees expended by the plaintiff in employing counsel and procuring sureties to obtain his release. Under the cited section the plaintiff was entitled to recover as special damage the amount he was compelled to expend or incur in his defense. If fees are not properly chargeable as damages in cases where a writ has been abused, by what process of reasoning may a ward be entitled to recover attorney's fees paid out by his guardian in a proceeding commenced on his own motion? If the attorney's fees paid by Mrs. McCallom were incurred in an action voluntarily commenced by her how can they be held to have been directly or proximately caused by an act of Hornaday? Not a single order of the Probate Court allowed costs against Hornaday as guardian, but in each instance they were taxed against him personally.

Because the surety was responsible only for the faithful performance of such duties as were imposed by law upon the assured as guardian, there was no obligation upon him to defend against the removal proceeding. His duty which was guaranteed by the surety was to account for moneys or other movables that came to his hands. That act was complete when his successor receipted for the total inventory. *Moody v. Pacific Surety Co.*, 41 Cal. App. 287, 289, 182 P. 802; 11B Cal. Jur., p. 930, sec. 1398.

Moreover, the very contest in which Hornaday was engaged to retain his office was a personal controversy. Even though guardian of the estate, he could not collect therefrom his expenses for defending his position. If he could not charge to the estate of the minor his expense of defense, *In re Estate of Schwartz*, 87 Cal. App. 2d 569, 574, 197 P. 2d 223, why should his prosecutors collect their expenses from him?

As to the obligation of the surety for acts done by Hornaday it was necessary to allege that while he was attempting to perform an official act in the line of his duties he injured the estate. *Felonicher v. Stingley*, 142 Cal. 630, 632, 76 P. 2d 504. If he engaged in doing an act not of an official nature, it was personal. For his personal acts or thoughts or schemes the surety was not liable. If it cannot be alleged that the injury he did to the estate was committed while attempting to do an official act then the surety is not liable on its bond, Id., 142 Cal. at page 634, 76 P. 504, and the demurrer was properly sustained without leave to amend.

The appeals from the orders sustaining the demurrers to the petitions in the guardianship proceedings are dismissed; the judgments of dismissal of the two actions pursuant to the sustaining of demurrers are affirmed.

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The index for 1951 is on page 114 in Jan 1952, Vol. 19.